United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1903.

No. 1319.

WILLIAM HEPBURN RUSSELL AND WILLIAM BEVERLY WINSLOW, APPELLANTS,

vs.

THE WASHINGTON SAVINGS BANK.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 11, 1903.

In the Court of Appeals of the District of Columbia

WILLIAM HEPBURN RUSSELL ET AL., Appellants,
vs.
THE WASHINGTON SAVINGS BANK. } No. 1319.

a Supreme Court of the District of Columbia.

WILLIAM HEPBURN RUSSELL and WILLIAM Beverly Winslow, Co-partners, Doing Business under the Firm Name of "Russell & Winslow," Plaintiffs,
vs.
THE WASHINGTON SAVINGS BANK, a Corporation, Defendant. } No. 42452. At Law.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Declaration.*

Filed September 15, 1898.

In the Supreme Court of the District of Columbia.

WILLIAM HEPBURN RUSSELL and WILLIAM Beverly Winslow, Co-partners, Doing Business under the Firm Name of "Russell & Winslow," Plaintiffs,
vs.
THE WASHINGTON SAVINGS BANK, a Corporation, Defendant. } At Law. No. 42452.

1. The plaintiffs, William Hepburn Russell and William Beverly Winslow, co-partners doing business under the firm name and style of "Russell & Winslow," sue the defendant, The Washington Savings Bank, a corporation organized and incorporated under the laws of the State of West Virginia, and having its office and doing business in the city of Washington, in the District of Columbia, for money payable by the defendant to the plaintiffs for work done and materials provided by the plaintiffs for the defendant at its request; and for money lent by the plaintiffs to the defendant; and for money paid by the plaintiffs for the defendant at its request; and for money received by the defendant for the use of the plaintiffs; and

for money found to be due from the defendant to the plaintiffs on accounts stated between them.

And the plaintiffs claim the full sum of eight hundred and
2 ninety-five dollars ($895.00), with interest at the rate of six (6) per centum per annum from the 10th day of September, A. D. 1898, according to the particulars of demand hereto annexed, besides the costs of this suit.

EDWARDS & BARNARD,
Attorneys for Plaintiffs.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise, judgment.

EDWARDS & BARNARD,
Attorneys for Plaintiffs.

3 *Particulars of Demand.*

The Washington Savings Bank, Washington, D. C., to Russell & Winslow, Dr.

1898.			
Aug.	17.	Retainer and consultation fee *in re* claim against Arkell Publishing Co.....	$350.00
"	18.	Consultation with George O. Ferguson, vice-president.....	10.00
"	19.	Consultation with George O. Ferguson, vice-president; letter to W. J. Arkell.....	15.00
"	"	Consultation with George O. Ferguson, vice-president, and conference with him and Mrs. Frank Leslie and her manager at her hotel.....	25.00
"	20.	Consultation with George O. Ferguson, vice-president, and letters to John Jacob Astor, Chauncey M. Depew, H. Walter Webb, Geo. H. Daniels, E. C. Converse, Felix Campbell, Henry Lindermeter, John H. Flagler, J. C. Yager, Geo. West and Jno. M. Bailey H. C. Duval and Anthony N. Brady.....	25.00
"	"	Consultation with Geo. O. Ferguson, vice-president, and visits to and conference with the officers of the Mercantile national bank, Western national bank and the Knickerbocker Trust Company.....	25.00
"	22.	Consultation with George O. Ferguson, vice-president, and letters to J. W. Chapman, Chas. Wiel & Co., Bank of the Metropolis, Knickerbocker Trust Co., Tradesmen's national bank, National Park bank and Western national bank; also letter to W. J. Arkell.....	15.00
		Amount forward.....	$465.00

4 *Particulars of Demand*—Continued.

	Amount forward.....	$465.00
Aug.	24. Examination of court proceedings and schedules; visit to and conference with Davies, Stone & Auerbach and the vice-president of the Knickerbocker Trust Co.; also vice-president of the Produce Exchange Trust Co.; consultation with Field & Deshon, counsel for Produce Exchange Trust Co.; examination of the mortgage at the office of Knickerbocker Trust Co.; letter to Geo. O. Ferguson, vice-president.....	100.00
"	25. Firm consultation and examination into affairs of Arkell Publishing Co., the question of the validity of the mortgage considered; also as to validity of voting trust provision under proposed re-organization agreement; general examination of authorities and discussion of the questions involved	100.00
"	31. Consultation with George O. Ferguson, vice-president, and letters to Washington savings bank	5.00
Sept.	1. Consultation with George O. Ferguson, vice-president, and President Schenck of Mercantile nat'l bank at the bank.....	10.00
"	2. Consultation with George O. Ferguson, vice-president, covering several hours during which the entire situation of Arkell Publishing Co., business and the litigation, as looked into by us, was reviewed and stated; letters to John Jacob Astor, Chauncey M. Depew, H. Walter Webb, Geo. H. Daniels, H. C. Duval, Anthony N. Brady, E. C. Converse, Felix Campbell, Henry Lindenmeyer, John H. Flagler, George West, John M. Bailey, J. W. Chapman, Chas. Wiel & Co., Bank of the Metropolis, Knickerbocker Trust Co., Tradesmen's national bank, National Park bank and Western national bank; also conference at Tradesmen's national bank with George O. Ferguson, vice-president, and the counsel of the bank.....	75.00
"	3. Letters to Auston B. Fletcher, J. Dilahunty, Hawkesworth & Ayrault, Franklin D. Peale, Sullivan & Cromwell, and Field and Deshon.....	5.00
	Amount forward.....	$760.00

5 *Particulars of Demand*—Continued.

	Amount forward.....	$760.00
Sept.	6. Consultation with George O. Ferguson, vice-president; subsequently, by his appointment, consultation with Sullivan & Cromwell, attorneys for Mrs. Frank Leslie and other creditors of the Arkell Publishing Company.....	10.00
"	7. Consultation with George O. Ferguson vice-president, in advance of conference with bondholders; conference with bondholders same afternoon at office of Russell & Winslow, lasting from 2.30 to 5 p. m., covering a full discussion of the situation of the Arkell Publishing Co., the proposed reorganization plan, the validity thereof and the validity of the mortgage, a number of attorneys representing different bond-holders being present and taking part in the discussion.....	50.00
"	" Consultation with a New York publisher, a prospective purchaser of the properties of the Arkell Publishing Company, including its publications, looking to the organization of a company to purchase said properties for cash or its equivalent in the interest of the bondholders, and especially of the Washington savings bank.....	25.00
"	9 & 10. Consultation with George O. Ferguson, vice-president, and trip to Washington, at his request for conference with officers and directors of the bank.....	50.00
	Total	$895.00

Interest thereon at the rate of six per centum per annum from September 10, 1898.. .....

6 STATE OF NEW YORK, *City of New York,* } *To wit:*

I, William Hepburn Russell, being first duly sworn, on oath state that I am a member of the firm of Russell & Winslow, composed of myself and William Beverly Winslow, the plaintiffs named in the declaration hereto annexed and forming a part of this affidavit; that we are members of the bar of the State of New York and in the active practice of our profession of the law in the city of New York; that the plaintiffs' cause of action in said declaration is for money owing to the plaintiffs from the defendant for professional

services rendered by the plaintiffs, or one of them, to or for the defendant, and for moneys paid out and advanced at the defendant's request, as set forth in said declaration, and in the particulars of demand hereto also annexed and made a part of this affidavit; that such services were rendered and said cash advanced at the request and for the use of the defendant, and the charges therefor are just, reasonable and proper, and no more than adequate for the services advice and labor given, rendered and performed, as stated in said particulars of demand; and that the full sum of eight hundred and ninety-five dollars ($895.00), with interest, as stated, is justly due and owing to the plaintiffs from the defendant by reason of the premises exclusive of all set-offs and just grounds of defense.

WM. HEPBURN RUSSELL.

Subscribed and sworn to before me, a notary public in and for said city and State, this 14th day of Sept. A. D. 1898.

JNO. E. RUSTON,
Notary Public, Kings Co.

[SEAL.]

Certificate filed in N. Y. Co.

7 *Defendant's Plea.*

Filed October 8, 1898.

In the Supreme Court of the District of Columbia.

WILLIAM HEPBURN RUSSELL and WILLIAM Beverly Winslow, Co-partners, Doing Business under the Firm Name of "Russell & Winslow," Plaintiffs, *vs.* THE WASHINGTON SAVINGS BANK, a Corporation, Defendant.	At Law. No. 42452. Docket —.

The defendant for plea says that it never was indebted in manner and form as in the declaration alleged.

THOS. C. TAYLOR,
Attorney for Defendant.

DISTRICT OF COLUMBIA,
County of Washington, } *ss:*

I, Charles H. Davidge of the District and county aforesaid on oath say that I am the treasurer of The Washington Savings Bank, the defendant named in the declaration. I further say that the defendant is not indebted to the plaintiffs or either of them as in the declaration alleged; that the plaintiffs never rendered any professional or other services to and for the defendant nor ever paid out or advanced any money whatsoever at the defendant's request; that the defendant never accepted or received any professional or other services from the plaintiffs or either of them; nor did the plaintiffs or either of them ever pay out or advance any money to or for the de-

fendant on any account whatsoever. I further say that the
8 defendant never requested, employed or authorized the plaintiffs or either of them to render or perform any professional or other services or to pay out any money whatsoever to or for the use of the defendant.

CHARLES H. DAVIDGE,
Treasurer Washington Savings Bank.

Subscribed and sworn to before me this 8th day of October, A. D. 1898.

CH. MAGILL SMITH,
[SEAL.] *Notary Public.*

Joinder of Issue.

Filed October 13, 1898.

In the Supreme Court of the District of Columbia.

RUSSELL & WINSLOW, Plaintiffs,
vs.
WASHINGTON SAVINGS BANK, Defendant. } No. 42452. At Law. Docket 46.

The plaintiffs join issue upon the plea of the defendant filed herein.

EDWARDS & BARNARD,
Attorneys for Plaintiffs.

March 2, 1903.—Verdict for defendant.

Supreme Court of the District of Columbia.

FRIDAY, *March 6th*, 1903.

Session resumed pursuant to adjournment, Hon. H. M. Clabaugh, justice, presiding.

* * * * * * *

WILLIAM HEPBURN RUSSELL and WILLIAM Beverly Winslow, Copartners, Doing Business under the Firm Name of "Russell & Winslow," Plaintiffs,
vs.
THE WASHINGTON SAVINGS BANK, a Corporation, Defendant. } No. 42452. At Law.

Upon motion of plaintiffs' attorneys it is ordered that judgment on the verdict herein be entered: Thereupon, it is considered that the plaintiffs herein take nothing by this suit, that the defendant go hereof without day, and recover of the plaintiffs its costs of defense, to be taxed by the clerk, and have execution thereof.

From the aforegoing judgment the plaintiffs by their attorneys in open court, note an appeal to the Court of Appeals of the District of Columbia, and pray that bond be fixed.

Thereupon, it is ordered that said plaintiffs shall furnish
10. bond for costs on said appeal, with surety or sureties to be approved by this court, in the sum of one hundred (100) dollars, or deposit in lieu thereof fifty (50) dollars, in the registry of this court, as security for costs.

Order for Appeal, &c.

Filed March 6, 1903.

In the Supreme Court of the District of Columbia, the 6th Day of March, 1903.

WM. H. RUSSELL ET AL.
vs.
THE WASHINGTON SAVINGS BANK. } At Law. No. 42452.

The clerk of said court will please note on behalf of the plaintiffs an appeal from the judgment in the above cause to the Court of Appeals of the District of Columbia, and issue a citation to The Washington Savings Bank, a corporation, appellee.

W. H. ROBESON,
Attorney for Plaintiffs, Bond Building.

11 In the Supreme Court of the District of Columbia.

WILLIAM HEPBURN RUSSELL and WILLIAM Beverly Winslow, Copartners, Trading as "Russell & Winslow,"
vs.
THE WASHINGTON SAVINGS BANK, a Corporation. } At Law. No. 42452.

The President of the United States to The Washington Savings Bank, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the rules of said court, pursuant to an appeal filed in the supreme court of the District of Columbia, on the 6th day of March, 1903, wherein William Hepburn Russell and William Beverly Winslow are appellants, and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant-, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this sixth day of March in the year of our Lord one thousand nine hundred and three.

J. R. YOUNG, *Clerk*,
By W. B. WILLIAMS, — *Clerk*.

Service of the above citation accepted this 7 day of March, 1903.
BIRNEY & WOODARD,
Attorneys for Appellee.

12 *Memorandum.*

March 26, 1903.—$50. deposited by plaintiff in lieu of appeal bond.

Supreme Court of the District of Columbia.

SATURDAY, *April 4th*, 1903.

Session resumed pursuant to adjournment, Hon. H. M. Clabaugh, justice, presiding.

WILLIAM HEPBURN RUSSELL and WILLIAM Beverly Winslow, Plaintiffs,
vs.
THE WASHINGTON SAVINGS BANK.
} No. 42452. At Law.

Come now the plaintiffs by their attorneys and presenting their bill of exceptions, taken during the trial of this cause, pray that the same be signed, now for then, which is accordingly done and ordered of record.

13 *Bill of Exceptions.*

Filed April 4, 1903.

In the Supreme Court of the District of Columbia.

WILLIAM HEPBURN RUSSELL, WILLIAM Beverly Winslow, Partners, Plaintiffs,
vs.
THE WASHINGTON SAVINGS BANK, a Corporation, Defendant.
} Law. No. 42452.

Be it remembered, that the above entitled cause came on for trial on the 24th day of February, 1903, before Mr. Justice Clabaugh and a jury, Messrs. William H. Robeson, Charles A. Keigwin, and Clayton E. Emig, appearing for the plaintiffs, and Messrs. Birney & Woodard for the defendant.

Whereupon, the plaintiffs, to maintain the issues upon their part joined, called as a witness, WILLIAM HEPBURN RUSSELL, who gave testimony tending to prove—

That he is, and was on and after August 17, 1898, a member of the firm of Russell & Winslow, the plaintiffs, who at, and after, said date were attorneys, doing business at 253 Broadway, New York city, that the witness became acquainted with George O. Ferguson, in Washington city, in the early summer of 1898.

The witness was then asked by whom he was introduced to Mr. Ferguson, to which question the defendant objected, whereupon the plaintiffs stated that they proposed, by this witness and in answer to

this question, to show that Ferguson was introduced to the
14 witness by Colonel T. H. Anderson, then one of the vice-presidents and directors of the defendant bank. The court sustained the defendant's objection; to which ruling and action of the court the plaintiffs then and there duly excepted.

This witness further testified that his first acquaintance with Ferguson was when he was introduced to him in Washington in the summer of 1898; that the next time he saw Ferguson was about August 17, 1898, on which day Ferguson came to the plaintiff's office in New York city, and sent in his card on which he had written "George O. Ferguson, vice-president, Washington savings bank."

The witness was then asked:

"State whether or not, at that time, Mr. Ferguson represented himself to be the agent or an officer of the Washington savings bank."

To which question the defendant objected, and the court sustained the objection; to which ruling and action of the court the plaintiffs then and there duly excepted.

The witness further testified that two or three or four weeks after this date (August 17, 1898) he was present with Ferguson in the office of the Washington savings bank; that there were present during part of the time Colonel Anderson, a vice-president of the defendant bank, and Mr. Davidge, its treasurer; that Ferguson was engaged in the private office at a desk from time to time and discussing apparently the conduct of the bank's business; that there was some discussion as to the relative authority of Mr. Ferguson and Mr. Davidge; that Mr. Ferguson became a little excited and said, "Well, I am the vice-president of this bank, in charge of its affairs here, and I employed Messrs. Russell & Winslow to
15 look after these matters, and I want the course that they advise followed;" that Mr. Davidge said that he did not want personally to take any part in the dispute, and before he did anything, he wanted to submit the question to Colonel Taylor, the president of the bank, who was absent either in Maine or New Hampshire, or possibly at that particular time in New York; that Ferguson was at the time sitting in the private office of the bank, at a desk which seemed to be one of the official desks of the bank, and was discussing apparently the conduct of the business. Colonel Anderson was there part of the time, and rather deprecated taking any part in what seemed at that particular time might be a controversy.

Thereupon the witness was shown a letter which he testified was a latter received by him or by his firm from the defendant, The Washington Savings Bank, on or about the first or second day of September, 1898, which letter was then by the plaintiffs offered and admitted in evidence and read to the jury.

Said letter is set out in full in this bill of exceptions at page 19 immediately following the letter of Russell & Winslow of August 31, 1898, to which it is a reply.

The witness then testified that the business regarding which Mr. Ferguson conferred with him at the time of his visit to plaintiff's

office (August 17, 1898) was a claim of The Washington Savings Bank, the defendant, against The Arkell Publishing Company, which had just failed, and had been placed in the hands of a receiver in New York. The amount of this claim was ten thousand dollars, and ten thousand dollars of the bonds of the Arkell
16 Company had been deposited as collateral security for the payment of the debt. The Arkell Company had failed very unexpectedly, and had been placed in the hands of a receiver by proceedings which were practically *ex parte*. The creditors, who were somewhat numerous, were naturally seeking to protect their interests, and it was in this emergency that the matter was brought to the attention of the plaintiffs by Ferguson on August 17. Mr. Ferguson did not have the notes with him. They were notes owned by the Washington savings bank, executed by the Arkell Publishing Company.

The witness was then asked:

"What statement did Mr. Ferguson make to you in reference to the whereabouts of the note?"

To which question the defendant objected, and the court sustained the objection; to which ruling and action of the court the plaintiffs then and there duly excepted.

The witness further testified that at the time of this employment of his firm by Ferguson, he had no knowledge whatever of the endorsements of the notes by Ferguson.

The witness was then withdrawn from the witness stand and the plaintiffs read to the jury the deposition of George O. Ferguson, taken in January 1902. Said witness testified as follows:

That his present place of residence is in Kansas City Missouri. That in August, 1898, and for a considerable period thereafter, he resided in Washington city; that during the year 1898, and especially in the months of August and September of that year, he was a director in and vice-president of the defendant, The Washington Savings Bank; that the president of the bank was Colonel Taylor; that in August, 1898, and particularly on the 16th, 17th and
17 18th, Colonel Taylor, the president, was in the White Mountains of Vermont, attending to a sick child.

The 6th interrogatory of the deposition was then read, being as follows:—

State whether the president of the bank, was, during that month and particularly on the day named, engaged in the active management and administration of the affairs of the defendant bank?

To this interrogatory the defendant objected, and the court sustained the objection, to which ruling and action of the court the plaintiffs then and there duly excepted.

The witness answered, "No."

The 7th interrogatory propounded to the witness was as follows:

State whether during that month and particularly on the days named, you, as vice-president of the bank, were giving your personal attention to its affairs and discharged the executive duties in the absence of the president?

To this interrogatory the defendant objected, and the court sustained the objection; to which ruling and action of the court the plaintiffs then and there duly excepted.

The witness answered the 7th interrogatory "Yes."

The 8th interrogatory propounded was as follows:

If, in answer to interrogatory 7, you state you were giving attention to the affairs of the defendant bank during the month of August, 1898, and performing the duties or some of the duties of the president during his absence upon his summer vacation, then
18 state the circumstances under which you came to so act, and what, if any, conversation or conversations you had with President Taylor before his departure for his summer vacation regarding the part you were to take in the administration of the affairs of the bank during his absence.

To which interrogatory the defendant objected, and the court sustained the objection; to which ruling and action of the court the plaintiffs then and there duly excepted.

The witness answered the 8th interrogatory as follows:

Col. Taylor, before departing, explained to me the reason for his going, which was largely because of the illness of his little son, and remarked that he might be absent for some time and requested that I remain at Washington, which I had never done before at this season of the year, and take his place in the bank as vice president, which I consented to do, and did do.

The 9th. interrogatory was then read, as follows:

State whether or not you went to the city of New York and to the office of the plaintiffs, Messrs. Russell & Winslow and asked them to act as attorneys for the Washington Savings Bank in the matter of the claims of that bank against the Arkell Publishing Company and the Arkell father and son.

To which interrogatory the defendant objected, and the court sustained the objection, to which rulings and action of the court the plaintiffs then and there duly excepted.

The answer of the witness to the 9th interrogatory was as follows:

19 I did, after consulting with other officers and directors of the bank.

The 10th interrogatory was then read, it being as follows:

If you answer that you employed Russell & Winslow, the plaintiffs, as attorneys for the defendant bank in the matter referred to, state whether at the time of employing them you stated to them that you were the vice-president of the bank and that in the absence of the president you were discharging the executive duties. State as fully as you can now regarding what you stated to the plaintiffs or either of them regarding your employment of them in this matter, and also regarding your position and authority in the bank.

To which interrogatory the defendant objected, and the court sustained the objection; to which ruling and action of the court the plaintiffs then and there duly excepted.

The witness' answer to the 10th interrogatory was as follows:

I sought the employment of Messrs. Russell & Winslow because Mr. Russell was personally known to Col. Anderson, the second vice-president of the bank, and one of the directors, and who spoke very favorably of him. In conversation with Mr. Russell when I was employing them, I stated in the absence of president, Col. Taylor, I was acting as vice president, and that after consulting with my associates in Washington we had decided to place the matter of the collection of the Arkell notes and the entire handling of the matter in their hands.

The plaintiffs then offered to read that part of the 10th interrogatory, which is in these words:

20 "State as fully as you can now recollect it, your statement to Messrs. Russell & Winslow or either of them, regarding your employment of them to act for the defendant The Washington Savings Bank, in the matter of said claims; also regarding your position and authority in the bank."

The court permitted the question thus abbreviated to be read and the foregoing answer was also then permitted to be read.

The 11th interrogatory was then read, it being as follows:

State whether or not the plaintiffs, Messrs. Russell & Winslow accepted employment from you under the circumstances detailed above to act for and on behalf of The Washington Savings Bank, the defendant, in the matter of its claim against the Arkell Publishing Company *et al.*

To which interrogatory the defendant objected, and the court sustained the objection; to which ruling and action of the court the plaintiffs then and there duly excepted.

The answer of the witness to the 11th interrogatory was as follows:

"Yes."

The 12th interrogatory was then read, it being as follows:

State whether or not, after you had retained Messrs. Russell & Winslow to act for the Washington Savings Bank as its attorneys in the matter above set forth, you stated to them generally that they were to take such steps and pursue such course as in their judgment seemed for the protection of the defendant, The Washington Savings Bank.

21 To which interrogatory the defendant objected, and the court sustained the objection; to which ruling and action of the court the plaintiffs then and there duly excepted.

The answer of the witness to the 12th interrogatory was as follows:

"Yes."

The 13th interrogatory, and the answer were then read, as follows:

State whether or not between August 17, 1898 and September 10, 1898, you as vice-president of the bank, had various consultations and interviews with Messrs. Russell & Winslow, or one of them regarding the claims of the bank against the Arkell Publishing Company.

Ans. Yes, I was in constant consultation with them.

The 14th interrogatory was then read, it being as follows:

State whether or not between August 17 and September 10, 1898, Messrs. Russell & Winslow, and each of them, gave a great deal of time and attention to the claim of the defendant The Washington Savings Bank against the Arkell Publishing Company, and whether they did this pursuant to consultations with you, and whether you in such consultations represented to them that you were acting for the Washington Savings Bank as its vice president and giving them directions as such.

To which interrogatory the defendant objected, and the court sustained the objection; to which ruling and action of the court the plaintiffs then and there duly excepted.

22 The answer of the witness to the 14th interrogatory was as follows:

Yes. They took a very earnest interest in the matter and began to push for a settlement as I urged them daily because of the personal interest arising from my connection with the transaction with the Arkell Publishing Company. I remained in New York for a number of days and sought to aid Messrs. Russell & Winslow in every way in the preparation of their plans for securing a settlement with the Arkell Publishing Company. They spent a great deal of time hunting up other bondholders in order to get concerted actions in the work contemplated by them.

The 15th interrogatory was then read, it being as follows:

State whether or not on or about September 9, you had a consultation with Messrs. Russell & Winslow in their office in New York, and requested Mr. Russell to go with you to Washington for conferences with some of the officers and directors of the Washington savings bank in that city, and whether you made this request in behalf of the Washington savings bank.

To which interrogatory the defendant objected, and the court sustained the objection; to which ruling and action of the court the plaintiffs then and there duly excepted.

The answer of the witness to the 15th interrogatory was as follows:

"Yes."

The 16th interrogatory and the answer thereto were then read, as follows:

State whether Mr. Russell, of the plaintiff firm, did go to
23 Washington with you on the night of September 9, or about that date and whether on the succeeding day he conferred with you and the treasurer of the defendant bank, at their bank house in the city of Washington.

Ans. Yes.

The 17th interrogatory was then read, it being as follows:

If in answer to the last interrogatory you state that Mr. Russell did go to Washington with you and did consult with you as vice president and with the treasurer of the defendant bank at the banking house of the defendant in the city of Washington then state whether or not at that conference any question was raised as to your

authority to employ Messrs. Russell & Winslow to act for the bank or as to their being regularly retained attorneys of the bank in the matter of its claims against the Arkell Publishing Company.

To which interrogatory the defendant objected, and the court sustained the objection; to which ruling and action of the court the plaintiffs then and there duly excepted.

The answer of the witness to the 17th interrogatory was as follows:

No question was raised as to my authority to employ Messrs. Russell & Winslow to act for the bank, by any officer thereof or any director during the conference which was had in the bank at that time, nor any other time.

At the conference in the bank, on or about September 10, Messrs. Russell & Winslow were certainly recognized by the bank as its counsel, and every phase of the case was gone over with them by myself and the cashier, and the second vice-president. At
24 this conference there was no dissent from their counsel expressed by any officer of the bank.

The 18th interrogatory and answer were then read, being as follows:

State whether at such conference with the treasurer of the bank, the policy to be pursued in connection with the reorganization of the Arkell Publishing Company was discussed, and also the question whether a sale should be made of the collateral held by the bank to secure the note of the Arkell Publishing Company representing the claim of the bank against that company.

Ans. Yes. The matter was gone into thoroughly.

The 19th interrogatory was then read, it being as follows:

State whether as the result of this conference Mr. Russell, of the plaintiff firm, advised you in the presence of the treasurer of the bank, it would be better to have a consultation with the president and requested that you arrange for such consultation to be held in New York.

To which interrogatory the defendant objected, and the court sustained the objection; to which ruling and action of the court the plaintiffs then and there duly excepted.

The answer of the witness to the 19th interrogatory was as follows:

Yes. It was decided that we should immediately send for the president, Col. Taylor, and have him meet Mr. Russell and myself at the office of Russell & Winslow in New York, and this action was taken.

The 20th interrogatory was then read, it being as follows:
25 State whether you subsequently advised Messrs. Russell & Winslow that such consultation had been agreed upon between yourself and President Taylor, and that he would be at the office of Russell & Winslow for that purpose at a date to be fixed.

To which interrogatory the defendant objected, and the court sustained the objection; to which ruling and action of the court the plaintiffs then and there duly excepted.

The answer of the witness to the 20th interrogatory was as follows:

Yes.

The 21st interrogatory was then read, it being as follows:

State whether or not it is a fact that you did arrange with President Taylor to hold such consultation with Messrs. Russell & Winslow, stating to him or conveying to him the information that Messrs. Russell & Winslow were acting as attorneys for the bank in the matter of its claim against the Arkell Publishing Company.

To which interrogatory the defendant objected, and the court sustained the objection; to which ruling and action of the court, the plaintiffs then and there duly excepted.

The answer of the witness to the 21st interrogatory was as follows:

I informed Col. Taylor of all that I had done in his absence and he approved of my course up to that time and agreed with me that he would meet me in New York for further consultation with Messrs. Russell & Winslow at a time that was then definitely fixed and agreed upon, the date of which I have forgotten.

26 The 22nd interrogatory was then read, it being as follows:

State whether or not in the matter of the employment of Messrs. Russell & Winslow at the time hereinbefore states, to represent the defendant bank, you in any way employed or retained them to act for you personally or whether their employment was exclusively for and in behalf of the bank, and to protect its interest and claims against the Arkell Publishing Company.

To which interrogatory the defendant objected, and the court sustained the objection; to which ruling and action of the court the plaintiffs then and there duly excepted.

The answer of the witness to the 22nd interrogatory was as follows:

No. I had never employed Messrs. Russell & Winslow to represent me in any personal matter in any way whatsoever prior to this time, and indeed only had a slight acquaintance with Mr. Russell. His being acquainted with Col. Anderson more than anything decided me in my judgment to employ the firm in behalf of the bank. Their employment by me as vice-president of the bank was wholly for and in behalf of the bank. I had no thought of my own personal interest at that time and my interest was almost wholly for the bank.

Interrogatory 23 was then read, being as follows:

Has Russell & Winslow been your attorneys at any time prior to September 10, 1898?

The witness answered "No."

Interrogatory 24 was then read, being as follows:

27 State whether any other attorney was employed by President Taylor upon his return and whether Russell & Winslow were relieved from further employment.

To this interrogatory the witness answered—

Yes. Col. Taylor, unfortunately for the bank, upon his arrival in New York ignored the appointment he had made with me to meet

our counsel Messrs. Russell & Winslow at their office, and sought out one Louis F. Doyle, and retained him as counsel. This was done wholly on his own personal responsibility and without consultation with any other members of the board of officers of the bank. Messrs. Russell & Winslow were not notified that they were relieved from further employment in the case by the bank, and I declined to recognize Doyle as the bank's attorney, and continued to co-operate with Messrs. Russell & Winslow.

The 25th interrogatory was then read, being as follows—

State whether or not on about September 7th, Russell & Winslow reported to you that they had heard that one Louis F. Doyle, an attorney in New York, was claiming to be the attorney of the defendant bank in the Arkell Publishing Company matter, and what you stated to them in response regarding the condition of their services and your authority to employ them and the acquiescence by the bank of your action. To refresh your memory as to this interrogatory, we exhibit herewith copy of a letter to Russell & Winslow, dated, New York, September 7, 1898, and ask you to say whether you wrote the letter of which this is a copy and to answer the interrogatory in the light of said letter.

28 To which question the defendant objected and the court sustained the objection; to which ruling and action of the court the plaintiffs then and there excepted.

The witness's answer to this interrogatory was—

Yes. Messrs. Russell & Winslow, through Mr. Russell, *I* learned of the employment of Mr. Doyle by Col. Taylor, and asked me for an explanation of such proceeding upon the part of Col. Taylor. I said to them at the time I had retained them as counsel for the bank, to look after its interests and in view of the plan of procedure in the premises, which they were diligently working on in conjunction with the other bond holders and creditors of the Arkell Publishing Company, I regard it as a serious misfortune for them to drop out of the case, and I continued to regard them as counsel for the bank. This was embodied in a written communication of September 7, 1898.

Interrogatory 26 was then read, being as follows—

If you state that you did write the letter of which a copy is exhibited to the foregoing interrogatory, then state whether or not upon the date in question, namely, September 7, 1898, you were present in New York city and held a consultation with Messrs. Russell & Winslow in relation to the claim of the defendant bank against the Arkell Publishing Company, and if upon the afternoon of that day, acting under your instructions Messrs. Russell & Winslow, as attorneys for the defendant bank had a conferance at their office with numerous bond holders and attorneys for bond holders of the Arkell Publishing Co., at which conference the proposed plans for reorganization of the Arkell Publishing Company were under consideration.

29 To which question the defendant objected and the court sustained the objection; to which ruling and action of the court the plaintiffs then and there duly excepted.

The witness's answer to this interrogatory is as follows:

On the afternoon of September 7, pursuant to an arrangement effected by Messrs. Russell & Winslow, and according to my instructions they called a conference at that office of the various bondholders and attorneys for bondholders for the Arkell Company, and there was a lengthy discussion of the plans for the reorganization of the Arkell Publishing Company.

Interrogatory 27 was read, being as follows:

State whether you know or not from the date of their employment on or about August 17, 1898, up to September 10, 1898, or about that date Messrs. Russell & Winslow and each of them acted faithfully, intelligently and consistently in pressing the claim of the Washington Savings Bank against the Arkell Publishing Company and in seeking to devise ways and means to secure a preference for such claims to fully protect the bank in the premises.

To which question the defendant objected and the court sustained the objection; to which ruling and action of the court the plaintiffs then and there duly excepted.

The 28th interrogatory was then read, being as follows:

State whether about September 9, 1898, you had an appointment with President Taylor of the defendant bank to meet you at the office of Russell & Winslow, and if at a late moment you were not advised of his inability to attend the conference, and whether
30 his failure to attend the conference was due to any claim that Russell & Winslow were not authorized to represent the bank, and whether you arranged with Mr. Russell, of the plaintiff firm, to go to Washington that night for the consultation there on the next day with President Taylor, as to the course to be pursued in behalf of the bank and in relation to the proposed reorganization of the Arkell Publishing Company.

To which question the defendant objected and the court sustained the objection; to which ruling and action of the court the plaintiffs then and there duly excepted.

The answer of the witness to this interrogatory is as follows:

Yes. There was a complete agreement between Col. Taylor and myself to meet at the office of Messrs. Russell & Winslow in New York. I knew nothing of any change in this plan up to the very last moment of the hour fixed. He gave me no notice whatever that he contemplated consulting or employing any other attorney in behalf of the bank and gave me no intimation that he disapproved of Messrs. Russell & Winslow as counsel for the bank, and I suggested to Mr. Russell of the plaintiff firm, that we go to Washington that night, the night of the day set for the meeting with Col. Taylor at their office, and consult with President Taylor as to the course to be pursued in the premises. To my knowledge there was no reason for Col. Taylor's action in employing other counsel than Messrs. Russell & Winslow, and to my knowledge none ever developed, except that he seemed to want it to be distinctly understood in this matter, as in all others pertaining to the bank's business, that he was
31 the sole authority and arbiter in all questions that related to

the bank or its interest. Such a position was wholly inconsistent with the successful operation of the bank as it would necessarily be in the operation of any corporate business.

The remainder of this witness's deposition being his cross examination, was then read to the jury, he testifying under cross interrogatories as follows:

The claims of the Washington Savings Bank against the Arkell Publishing Company were claims for money due upon promissory notes executed by that company but endorsed by the witness to the bank as an accom-odation endorser. The notes were accepted by the bank, after a thorough investigation by it as to the financial responsibility of the Arkell Publishing Company. There were two notes of $5000. each which the bank discounted at the request of the witness. The witness realized not more than $1000 from their discount. The largest part of the amount realized from the discount was applied by the bank as a payment on the witness's purchase of stock in the defendant bank, which stock the witness never received. The Arkell Publishing Company received about $3800 of the amount of the discount. The witness endorsed the paper as an accom-odation endorser, which was fully understood and agreed to at the time by the entire finance committee of the bank.

In September 1898, the witness was sued, jointly with the Arkell Publishing Company, by the bank, the bank's attorney in that suit being Louis F. Doyle. In said suit against him, the witness employed the plaintiffs to defend him wholly because of the acquaintance he had formed with them as vice-president of and in behalf of the Washington savings bank in the claim of the bank against the Arkell Publishing Company.

32 That the witness, in company with the plaintiff, Mr. Russell, visited Washington late in August or early in September, 1898, and had an interview there with Thomas H. Anderson, one of the vice-presidents and a director of the Washington savings bank, at which interview the indebtedness of the Arkell Publishing Company to the bank was discussed. That Mr. Anderson did not, in that interview, state to Mr. Russell that the witness was without authority to engage the services of his firm on behalf of the bank, and that the bank would not ratify such employment. That Col. Anderson was the first man with whom the witness consulted as to the policy to pursue with reference to this claim of the bank against the Arkell Company; that the witness was in Boston at the time of the failure of the Arkell Publishing Company, and that he came on to New York and there consulted with Mr. Arkell with reference to his notes, and was informed by him that the notes would be taken care of and advised him to give himself no concern about that; that the witness nevertheless hastened to Washington and consulted with Col. Anderson who was not only the second vice-president of the bank, but also its counsel. That the witness, in this conference, referred to the plaintiff Russell and his firm, and that Col. Anderson said he knew Mr. Russell and most heartily approved of the witness' plan to go immediately to New York and

employ them on behalf of the bank, and that later Col. Anderson expressed entire satisfaction with the witness' action in this particular. That Col. Anderson did not express a word of disapproval or state that the witness was without authority to employ the plaintiffs for the bank. That the witness' position as first vice-president, acting for the president in his absence, "would have sufficed, to
33 a man of Col. Anderson's standing and business sense, to render such a proposition ridiculous." That if the witness was without authority to employ the plaintiffs as counsel for the bank in the absence of the president and when the witness as first vice-president was acting in his stead, then every act performed by the witness during the period of the president's absence as vice-president was illegal and unauthorized.

That the witness did not at any time regard the debt of the Arkell Publishing Company to the bank as a personal debt, for the reason that the witness had never realized anything but the $1,000. from the discounting of said notes and for the further reason that the bank still held the stock which the witness had contracted to buy; that the witness ran the risk of losing, in the transaction, about $2500, whereas, if the notes were not paid he would lose also the entire commission due him from the Arkell Company for previous services, amounting to $6,000. That this $6,000 was to come out of the notes when paid and be applied on the stock purchased by the witness when the company paid the notes; that the witness represented to the finance committee and to Col. Anderson and to Mr. Davidge, the treasurer, and to Col. Taylor, the president, that the bank should not lose a dollar in the transaction and that they had not lost any money except the expense of the unnecessary lawsuit against the witness and the Arkell Publishing Company jointly. That the witness had made at least two offers to pay the $2500, which the bank had put into the matter and take up the notes and the collateral security; that the witness has been at all times ready, and is yet ready, to pay the balance due the bank upon the delivery of
34 the Arkell notes and the Arkell Company's bonds. That the witness "certainly took it up as the bank's claim and employed Mess. Russell & Winslow as counsel for the bank for the reason, which must be apparent, that my only hope was that as the claim had wholly passed into the hands of the bank and was entirely out of my hands, it was only through the bank that it could be collected."

In further cross interrogatories the witness was handed an envelope, and asked to state whether the address written thereon was in his handwriting.

He answered "Yes." He also identified a letter handed to him by the examiner, and stated that that signature was his; that the counsel referred to in the letter was Russell & Winslow, the plaintiffs; that the reference to them in his letter was not to them as counsel employed by him personally to undertake any business for him personally or to serve him personally in relation to the Arkell transactions with the bank; that his reference to the employment

of counsel was merely a reiteration of what had been clearly laid before every officer of the bank prior to that time, namely, that as vice-president, in the absence of the president, he deemed it of the utmost importance to secure counsel to look after the interests of the bank; that the fact that he was accommodation endorser on the Arkell notes in no way relieved the bank from its obligation to press the collection of the notes and to protect its own interests therein; that while the bank might hold him as endorser to the extent of the amount they had paid, about $2500, the witness in his capacity as vice-president, claimed the right to employ counsel to represent the bank among other bondholders whose claims were being
35 looked after by attorneys under the proposed plan of reorganization, of the Arkell Company.

The letter exhibited with this cross interrogatory (No. 2) is as follows:

AUGUST 27, 1898.

C. H. Davidge, Wash. savings bank.

DEAR SIR: I am unable to understand you. Don't you realize the value of the legal services of my counsel in N. Y., whose orders to me are to sell those bonds and thus double our claim against the Arkell Company?

I am the one now to whom the bank is looking for the money, and I am after it with heat and haste, but if the bank in its usual stupid bungling fails to do the bidding of eminent legal counsel which I have employed to aid in this work, the bank must take the consequences, not I. If those bond- are not sold on Tuesday next, I shall renounce all further effort and disclaim any further responsibility for the collection. If you are such a high authority in law go ahead in your own way.

Very truly yours, GEO. O. FERGUSON.

Upon re-direct examination the witness further testified:

Referring to the sentence with which that letter begins "I am unable to understand you," I am of the impression that it was in answer to a letter received from Mr. Davidge, but I am not
36 positive about it. I cannot tell whether I still have that letter as my letter files are not now accessible; that the use of the pronoun "I" did not refer to me individually and personally, but to myself as vice-president of the bank. I was doing all that I could in my capacity as vice president in behalf of the bank for the collection of its claim; that the witness had no thought of employing counsel in his own behalf; that while the witness was in New York some correspondence passed between himself and the bank relative to this claim and that the witness has no copies of the letters he wrote and that the letters written to him are not accessible.

The witness, WILLIAM HEPBURN RUSSELL, resumed the witness stand, and was asked the following question—

Referring to the time when Mr. Ferguson called at your office in New York in reference to this claim of the Washington savings bank,

I will ask you simply to state what took place there between yourself and Mr. Ferguson.

To which question the defendant objected and the court sustained the objection; to which ruling and action of the court the plaintiffs then and there duly excepted.

The witness further testified that Ferguson did not employ him or his firm in any manner for himself individually.

The witness was asked.

I will ask you if Mr. Ferguson at this time disclosed that he was in any wise interested in these notes.

To which question the defendant objected.

Plaintiffs then stated to the court that they would prove by this witness, in answer to this question that Ferguson came to the
37 office of the plaintiffs in New York city, on or about the 16th or 17th day of August, 1898, and represented himself to the plaintiff firm, Russell & Winslow, as the vice president of the Washington savings bank; that he said to Russell that the bank had discounted two notes of five thousand dollars each, of the Arkell Publishing Company, which were secured by the same amount of bonds of the Arkell Publishing Company; that the company was on the verge of bankruptcy or insolvency; that he desired the services of Mr. Russell and his firm for the protection of the interests of the bank; and that there was no indication or intimation on the part of Mr. Ferguson that the consultation was regarding any individual interest of his own or that he was acting otherwise than as vice-president of the bank for the protection solely of its interests.

The court sustained the objection; to which ruling and action of the court the plaintiffs then and there at that time duly excepted.

The witness continued his testimony as follows:

That the witness advised Furguson to make a certain disposition of the bonds which were held as collateral security for the notes. His advice to Mr. Ferguson was that the bank should advertise and sell the bonds at the earliest moment, and credit the amount realized on the notes; that the bank would doubtless be able to buy the bonds in at a nominal figure and would then be able in the insolvency proceeding to prove up the face of the bonds and the balance due on the notes, and receive the distributive share on both the bonds and the notes; the witness as counsel either for Ferguson or the bank directed Ferguson to have the bonds advertised; that at different times both Mr. Ferguson and Mr. Davidge told the witness the bonds had been advertised and a copy of the advertise-
38 ment was shown the witness, and on August 31, 1898, the plaintiffs wrote a letter addressed to the bank in relation to the failure to sell the bonds. The letter was here introduced and read to the jury. It is as follows:

Law offices of Russell & Winslow, Postal Telegraph building, 253 Broadway, New York.

AUGUST 31, 1898.

Washington Savings Bank, Washington, D. C.

GENTLEMEN: Mr. George O. Ferguson has just been in and advised us that, for some reason, you did not make a sale of the collateral which you hold to the note of the Arkell Publishing Company, on yesterday as advertised. We are both surprised and disappointed at this action upon your part, as we deem it is imperative that the collateral should be sold, so that an action can be brought on the notes. We find upon an examination of the affairs of the Arkell Publishing Company, that while its mortgage given to secure the bonds includes a number of tracts of land owned by the company and situated in the State of Texas, the mortgage has never been recorded in the State of Texas; consequently, the lands situated in Texas are subject to attachment and to execution, and we hoped to have the note so that we could bring an action upon it, and secure an attachment upon the lands in Texas.

Mr. Ferguson is here this morning, and is expecting Col. Taylor here to consult about the matter, but, it is already an hour
39 past the time which Col. Taylor appointed to be here, and we fear he will not come.

We do not know anything about the value of the real estate in Texas, but it must be worth something, and we think it advisable that an attachment should be placed on it at once before any of the parties interested ascertain that the mortgage has not been recorded there. If we do secure an attachment on the properties in Texas it will certainly further our desires and plans to force Arkell to a settlement of your entire claim. It is hardly necessary for us to add that whatever is done in regard to this matter ought to be done *immediately.*

Yours truly,
(Signed) RUSSELL & WINSLOW.

That on September 1, 1898, plaintiffs received the following letter from the bank, which letter was introduced and read to the jury, and is as follows:

Officers.

Joseph D. Taylor, president.

Vice Presidents.

George O. Ferguson.
J. O. Johnson.
C. H. Davidge,
Treasurer.

T. H. Anderson.
George W. Cissell.
J. F. B. Goldney,
Cashier.

Directors.	*Directors.*
Joseph D. Taylor.	L. G. Hine.
T. H. Anderson.	R. S. Lacey.
George O. Ferguson.	A. B. Graham.
George W. Cissell.	Francis Thomas.
J. O. Johnson.	Samuel Knox.
A. A. Hosmer.	R. E. Dean.
C. F. Scott.	R. H. Graham.
C. H. Davidge.	W. H. Taylor.
R. C. Taggart.	J. C. Weir.

Washington Savings Bank
(Successor to Ohio national bank).

40 WASHINGTON, D. C., *September* 1, 1898.

Messrs. Russell & Winslow, N. Y.

GENTLEMEN: Your letter of August 31, is at hand. In the absence of our president, Col. J. D. Taylor, I will forward your letter in regard to the matter of the Arkell Publishing Company to him for instructions in the premises.

Very respectfully,
(Signed) C. H. DAVIDGE.

The witness further testifies that between August 17, 1898, and September 10, 1898, he was in Washington twice and on both occasions he met and conferred with Mr. Ferguson at the bank. The second visit was at the request of Mr. Ferguson and was on September 9th or 10th. The witness was then asked the following question:

Mr. Russell I will ask you whether about the time of the writing of this last letter to the bank you had from Mr. Ferguson a retainer in writing, and state the circumstances under which that was executed, if there was one.

To which question the defendant objected and the court sustained the objection; to which ruling and action of the court the plaintiffs then and there duly objected.

The witness was then asked the following question—

On the occasion of your meeting with Mr. Ferguson in Washington on September 10, I will ask you where you found him, where you were engaged and in what he was engaged.

To which question the defendant objected and the court sustained the objection;

41 The plaintiff then offered to show that on September 10, Mr. Russell, of the firm of Russell & Winslow, held a conference with George O. Ferguson in a private room of the defendant bank, in which Mr. Davidge participated and Col. Anderson, another vice-president of the bank, and that during the progress of this conversation a number of items of business were transacted by Mr. Davidge and Mr. Ferguson for the bank, and that Mr. Ferguson

seemed to be in charge of the transaction of said business affairs and in some particulars directed the action of the cashier.

To which offer the defendant objected and the court sustained the objection.

The witness was temporarily withdrawn from the witness stand to permit the examination of another witness.

And thereupon the plaintiffs, further to maintain the issues on their part joined, called as a witness one HENRY G. HENFORD, who testified as follows:

That he is employed with the Evening Star Newspaper Company of Washington, D. C., and is familiar with the business management of that paper.

Thereupon the witness was shown a copy of a newspaper called the "Evening Star," and purporting to have been published at the city of Washington, D. C. on August 29, 1898. The witness testified that this publication was issued on the 29th of August, 1898, and that a certain notice therein contained, being the advertisement of the sale of ten thousand dollars of bonds was received by the newspaper company from Thomas J. Owen, auctioneer.

Thereupon the witness was shown another advertisement on page 3 of the same issue of the Evening Star, being the advertise-
42 ment of the Washington savings bank, and he testified that said advertisement was published in the issue of August 29, 1898, at the instance and request of the officers of the Washington savings bank. This advertisement was then read to the jury, and is as follows:

Washington Savings Bank, corner 12th and G Sts. N. W.

Pays interest on deposits and does a general banking business. Open every business day from 9.30 a. m. to 4 p. m., and on the 15th and last days of the month until 5 p. m., and on Saturdays until 12 m. Saturday evenings open from 6 to 8.

J. D. TAYLOR, *Pres't.* GEO. O. FERGUSON, *Vice Pres't.*
C. H. DAVIDGE, *Treas.* J. F. B. GOLDNEY, *Cashier.*

Safe deposit boxes $3 to $25 per year.
au. 15–1m 14.

And thereupon the plaintiffs, further to maintain the issues on their part joined, called as a witness one THOMAS J. OWEN, who testified as follows:

That his business is that of a real estate auctioneer and appraiser; that he knows the Washington savings bank that he has done some business for them, and being shown the advertisement of the Evening Star of August 29, 1898, advertising for sale certain bonds of the face value of ten thousand dollars, it being the same advertisement first identified by the witness Henford, as above set out, he stated that he inserted that advertisement at the request of Mr. Davidge, who was connected with the Washington savings bank; that he was

paid for the advertisement by Mr. Davidge, that there were
43 no other services rendered by him.

The advertisement was then read to the jury, and is in the following words:

Thos. J. Owen, auctioneer, 913 F Str. N. W.

Collateral Bonds at Auction.

To whom it may concern:

At the request of the holders I will sell at public auction within my office, 913 F Sts. N. W., on Tuesday, August thirtieth, 1898, at four o'clock, p. m. twenty (20) first mortgage gold coupon bonds of five hundred (500) dollars each of the Arkell Publishing Company of New York, numbering from 321 to 340, inclusive.

All parties in interest please take notice.

Terms cash.

THOS. J. OWEN,
Auctioneer, 913 F Str. N. W.

au. 25, 27, 29.

The plaintiff, WILLIAM HEPBURN RUSSELL, again resumed the witness stand and testified further:

That he has personally inspected the newspaper advertisement just read to the jury, being the advertisement of the bonds; that the witness had heretofore seen that publication or a clipping of the publication, though he did not see it in the paper itself; that the clipping was given him by George O. Ferguson; that on the 10th day of September, 1898, when the witness was at the Washington savings bank, in Washington, the president of the bank
44 was not there; and that he was not there on the occasion of his former visit; being the first of the two conferences held by him at the bank; that on one occasion there were present at the bank Vice President Ferguson, Colonel T. H. Anderson, and Mr. Davidge, treasurer. The witness and Mr. Davidge and Mr. Ferguson discussed the question why the bonds had not been sold. The witness declared to Mr. Davidge that he had advised Ferguson, as the vice-president of the bank, to sell the bonds and inquired why, after the bonds had been advertised they were not sold; that Mr. Davidge replied in substance "Yes, we advertised the bonds as you directed, but Colonel Taylor, when informed of the matter, vetoed the actual sale, and we had to stop it;" that Davidge showed that he did not want to take any part in the controversy that then seemed to exist; that the witness said to him "Why did not you make this sale?" and that he replied Because Colonel Taylor stopped it, after it had been advertised; and that he said also that he had intended to make the sale; that the witness then asked him what the difference was between himself and Ferguson over the matter, and he and Ferguson had some talk about their relative rights; that the witness said to Davidge, "Why did

not you take that advice we gave you?" That he again gave the reason that it was because Colonel Taylor had interfered and said that but for that they had intended to carry out the advice and sell the bonds; that the witness said to Davidge repeatedly that his firm had acted in the matter as the attorneys of the bank, and that he, Davidge, had never questioned that fact at any time prior to his instructions from Colonel Taylor.

45 The witness identified a letter dated September 6, 1898, written upon the letterhead of the Washington savings bank, addressed to Messrs. Russell & Winslow, New York city, and signed "C. H. Davidge" as an original letter received by his firm in New York on or about September 7, 1898; said letter was then read in evidence as follows:

"SEPTEMBER 6, 1898.

"Messrs. Russell & Winslow, New York city, N. Y.

GENTLEMEN: I am directed to refer you to Louis F. Doyle, our attorney, Times building, Park row, for any information you may desire in the matter of the Arkell Publishing Company referred to in your letter of the 31st ultimo.

Very respectfully,

(Signed) C. H. DAVIDGE."

The witness was asked the following question:

"Mr. Russell, I want to ask you what was done after this letter of September 6, written to you by Mr. Davidge, the treasurer of the bank, with further reference to the matter?"

And in explanation of the said question, counsel for the plaintiffs stated to the court:

I want this witness to answer what steps were taken by him in connection with Mr. Ferguson or Mr. Davidge or anyone else supposed to represent the bank, or what steps were taken by him as to the preservation of the bank's interests as to the notes after September 6th.

46 To which question the defendant then objected and the court sustained the objection; to which ruling and action of the court the plaintiffs then and there duly excepted.

The witness continued—That at the time of his first visit to the bank he found Ferguson there by a previous appointment; it was then that he was introduced to Davidge; Ferguson was back in the private office of the bank engaged in the discussion of business matters; that the witness went back there and talked with Ferguson over this matter and advised him as to the course to pursue; that considerable talk was had with reference to the situation of the Arkell Company, their reorganization and the proper course to be taken. Previous to this when Ferguson came to the office of the witness in New York, he had handed to the witness a printed plan of the reorganization of the Arkell Company, which was in an envelope addressed to the Washington savings bank.

At the time of this conference at the bank, Col. Taylor, the presi-

dent, was not there, and there was no other person there who seemed to be in authority except Ferguson and Davidge.

This plan of reorganization referred to had been handed to the witness by Ferguson on one of his visits to New York. It was a printed circular or plan of reorganization for the Arkell Publishing Company.

And thereupon the plaintiffs further to maintain the issues on their part joined, offered as a witness WM. B. WINSLOW, one of the plaintiffs, who testified as follows:

47 That he is a member of the plaintiff firm; that the witness first saw George O. Ferguson on August 17, 1898, in the office of his firm in New York city; that Ferguson and the plaintiff's partner Russell, were in consultation in the library of their office; that Ferguson had with him certain documents and papers, among which was a printed plan for the reorganization of the Arkell Company, dated some time in August, 1898.

The witness was then asked the following question:

State whether at the time Mr. Ferguson made any statement, and if so, what his statement was as to the purpose of his visit to the office of Russell & Winslow.

To which question the defendant objected and the court sustained the objections; to which ruling and action of the court the plaintiffs then and there duly excepted.

The witness was then asked the following question:

Mr. Winslow, please state whether or not at the instance and request of Mr. Geo. O. Ferguson, you and your firm took any action in reference to the claim of the defendant, The Washington Savings Bank, against the Arkell Publishing Company.

To which question the defendant objected and the court sustained the objection; to which ruling and action of the court the plaintiffs then and there duly excepted.

The witness was then asked the following question:

State whether or not from August 17, 1898, down to about the 14th of September 1898, the plaintiffs were in almost daily consultation with Geo. O. Ferguson and with certain creditors and attorneys for creditors of the Arkell Publishing Company in reference to the questions of the Washington savings bank against the Arkell Publishing Company.

48 To which question the defendant objected.

The plaintiffs then stated to the court that they intended to prove by this witness and in answer to this question that the services shown by the bill of particulars filed in this case were rendered on the dates shown on the bill of particulars, and that they were services rendered for the defendant, The Washington Savings Bank.

The court sustained the objection of the defendant; to which ruling and action of the court the plaintiffs then and there duly excepted.

The witness was then asked the following question:

I direct your attention to a letter dated August 31, 1898, addressed to the Washington Savings Bank, signed Russell & Winslow, being a letter which has already been given in evidence, and especially to this sentence in the letter near the close—"If we do secure the attachment on the properties in Texas, it will certainly further our desires and plans, and force Arkell to a settlement of your entire claim;" and I will ask you to state to what claim and to whose claim that language referred.

To which question the defendant objected and the court sustained the objection; to which ruling and action of the court the plaintiffs then and there duly excepted.

The plaintiffs then offered in evidence a letter dated New York city, September 7, 1898, addressed to the plaintiffs and signed "George O. Ferguson vice president Washington savings bank," being a letter of employment and ratification of employment, and offered the same in evidence for the purpose of proving the retainer and employment of the plaintiffs by the defendant bank, to which

49 letter and the offer thereof the defendant objected, and the court sustained the objection, to which ruling and action of the court the plaintiffs then and there duly excepted.

The said letter so offered and excluded, and to the exclusion of which said exception was taken, was as follows, to wit:

NEW YORK CITY, *September* 7, 1898.

Messrs. Russell & Winslow, 253 Broadway, city.

GENTLEMEN: In the absence from Washington, and also from New York, of Col. Taylor, president of the Washington savings bank, I, as vice-president of that bank, having full authority in the premises, came to New York and retained you as attorneys for the bank in the matter of its claim against the Arkell Publishing Company. I reported your employment to other officers of the bank, and no objection thereto or to my action in the premises was made. I know nothing of the employment of any other attorney, and direct you to continue to act for the bank. It is especially important that you should not decline to do so in view of the conference of the bondholders which you have called to meet at your office to-day pursuant to my request and in the interest of the bank I represent.

Very truly yours, GEO. O. FERGUSON,
Vice President Washington Savings Bank.

50 The witness was then asked:

"How frequently, if at all, after August 17, 1898 was George O. Ferguson in the office of Russell & Winslow and in consultation with them about these Arkell publishing claims held by the defendant bank?"

To which question the defendant objected.

Plaintiffs then stated to the court that they would prove by this witness, and in answer to this question, that George O. Ferguson was, on numerous occasions between August 17 and September 10, 1898, in the office of the plaintiffs, consulting with them about the

claims in behalf of the defendant bank against the Arkell Publishing Company.

The court sustained the defendant's objection to the question, to which ruling and action of the court the plaintiffs then and there duly excepted.

The witness was then asked the following question:

"State whether or not at any time between August 17, 1898, when Mr. Ferguson first came to the office of the plaintiffs, and September 5, 1898, you or the plaintiffs had heard the authority of Ferguson to act for the bank in your employment questioned."

To which question the defendant objected.

The plaintiffs then stated to the court that they would prove by the witness, in answer to this question that the witness and the plaintiffs had never, at any time between the dates indicated in the foregoing question, heard the authority of George O. Ferguson to act for the defendant bank in their employment questioned.

The court sustained the objection to the question, to which action and ruling of the court the plaintiffs then and there duly excepted.

51 The witness then testified further that on August 17, 1898, and during that year, that neither he nor his partner had any information or knowledge of the provisions of the charter of incorporation, the by-laws, the corporate records or the director's minutes of the Washington savings bank.

The witness was then asked the following question:

"State, if you know, about what date you and your firm ceased any acts, efforts or advice, and ceased in any way to serve as counsel for the defendant The Washington Savings Bank."

To which question the defendant objected and the court sustained the objection, to which ruling and action of the court the plaintiffs then and there duly excepted.

The witness was then asked:

"State at or about what date you and your firm ceased to do any act or give any advice consequent upon your employment by George O. Ferguson on August 17, 1898, in which employment Ferguson claimed to represent and act for the Washington savings bank."

To which question the defendant objected and the court sustained the objection; to which ruling and action of the court the plaintiffs then and there duly excepted.

The witness was then asked the following question:

"State what was the last date at which Russell & Winslow took any action or gave any advice in relation to the claim of the Washington Savings Bank against the Arkell Publishing Company."

To which question the defendant objected and the court sustained the objection, to which ruling and action of the court the plaintiffs then and there duly excepted.

52 The witness then testified further that a letter dated September 14, 1898, addressed to the plaintiffs, signed "Louis F. Doyle" is an original letter received by the plaintiff firm from said Doyle at or about the date it bears date. Said letter and the signa-

tures thereto having been thus identified, the following question was asked the witness:

"I will ask you whether or not, after the receipt of that letter, Russell & Winslow made any claim that they were the attorneys of the Washington savings bank in connection with the Arkell Publishing Company claim as to any services to be rendered by them after that date."

To which question the defendant objected and the court sustained the objection; to which ruling and action of the court the plaintiffs then and there duly excepted.

The witness then testified further that he was familiar with the handwriting and signature of Mr. Louis F. Doyle, and that the letter offered to him bore the genuine signature of said Doyle.

The letter was then offered and read in evidence, plaintiff stating that the word "now" in the last paragraph was clearly a typographical mistake and should be "not."

Said letter, so identified and read in evidence was as follows, to wit:

Louis F. Doyle, attorney and counsellor at law, Times building, 41 Park Row.

SEPTEMBER 14, 1898.

Messrs. Russell & Winslow, 253 Broadway, New York city.

DEAR SIR: I understand from Mr. George O. Ferguson
53 that he has employec you to take charge of the claim of the Washington Savings Bank of Washington, D. C., against the Arkell and Judge Publishing Company.

I desire to advise you that such employment by Mr. Ferguson is not authorized by the Washington savings bank and that I am the only one authorized to act in the matter for them.

Yours truly,

(Signed) LOUIS F. DOYLE.

The witness further testified that after the receipt of this letter from Louis F. Doyle, the plaintiffs rendered no further services and did not attempt to render any. That the bill of particulars, entitled "Particulars of demand," attached to the original declaration of the plaintiffs, which the witness examined item by item, constituted the several charges for services rendered, and that they were and are fair, reasonable and ordinary charges for such services; that the aggregate amount of the charges is $895, no part of which has ever been paid to the plaintiffs, and that the amount of $895. is due and owing to the plaintiffs from the defendant.

In reference to this proof it was stipulated between the parties in open court that the plaintiffs were not required to take up and prove in detail the separate items of services and the charges therefor making up the said aggregate of $895.

The witness further testified that the place of business of the defendant bank in 1898 was in Washington city, District of Columbia

that the place of business and the great bulk of the property and effects of the Arkell Publishing Company in August, 1898, were in
54 New York city, and that said company did not own any property in the District of Columbia or the State of West Virginia, according to its inventories, which the witness had examined; that prior to September 14, 1898, neither the witness nor the plaintiff firm were ever employed in any manner by George O. Ferguson, in his personal interest or behalf.

The witness further testified, on cross-examination that the plaintiff firm appeared for Ferguson in the suit brought by the Washington Savings Bank against Ferguson and the Arkell Publishing Company; that he did not remember whether the Arkell Publishing Company was a defendant or not, but did not believe it was; that when judgment was awarded against Ferguson in that suit the plaintiff firm appealed the case to an appellate tribunal.

A certain record was handed to the witness and he was asked to say if it was a copy of the record in the suit of the Washington Savings Bank against Ferguson. The witness admitted that it was a copy; that he himself had no personal connection with the case; and thereupon defendant's counsel read from the record as follows:

"This action was commenced on the 7th day of September, 1898, by the service of summons, a copy of complaint herein on the defendant," and the title of the cause, to wit "Washington Savings Bank, Washington, D. C., plaintiff, against George O. Ferguson, defendant," Defendant's counsel also read the summons, dated September 7, and signed by Louis F. Doyle as plaintiff's attorney.

Whereupon plaintiff's counsel called attention to said record, showing that the appearance of the plaintiff firm for Ferguson in said suit was entered on October 17, 1898.

The witness thereupon, upon re-direct examination, testi-
55 fied that on September 7, 1898, he had no knowledge or information that the Washington Savings Bank had brought this suit or served process upon George O. Ferguson.

The witness stated that on page 12 of this record it was shown that the answer of Ferguson was verified on October 17, 1898; that his firm knew nothing about the suit until after September 14th, when the letter from Doyle, above given in evidence, was received; that that was the first intimation plaintiffs had that Doyle was in that case to the exclusion of the plaintiffs; that prior to September 14, 1898, Ferguson had never spoken to witness or his firm about any suit brought against him.

Plaintiffs then recalled WILLIAM HEPBURN RUSSELL, who testified that it was not until after the middle of September, 1898, that he was apprized of the suit brought against Ferguson by the Washington Savings Bank; that he was certainly not aware of the fact when he came to Washington on the 10th of September, 1898.

The witness Russell, on cross-examination, testified that the first fee paid to his firm by Ferguson was at the time the record of the

case of the bank against Ferguson was being printed on appeal, which was in the early part of 1899.

On re-direct examination, the witness testified that he did not know the day on which process in the suit against Ferguson was actually served on Ferguson; that the commencement of the action by the issuance of the summons on the 7th of September did not at all indicate the date of the service of the process.

The plaintiffs, further to maintain the issues on their part joined, called as a witness HENRY F. WOODARD, who testified that he is one of the attorneys engaged by the bank in the trial of the present case; that in his professional capacity as its attorney, he has at the present time in his possession and in court a copy of the by-laws of defendant bank.

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The witness thereupon, at the request of plaintiffs, produced the said by-laws, which were offered and read in evidence, it being agreed that in making up the bill of exceptions only so much of said by-laws need be included as either party should deem material and should desire to insert in such bill.

Plaintiffs then read to the jury articles II, III, IV, V, VI, VII, IX, XIV and XXI of the said by-laws, which are as follows:

ARTICLE II.

The annual meeting of the stockholders shall be held on the first Thursday after the third Tuesday in January each year beginning with the year 1900, at which meeting there shall be elected not less than eleven nor more than twenty directors, who shall continue in office until their successors are elected and qualified. And if for any cause the election is not held at that meeting it shall be held at a subsequent meeting called for that purpose by the board of directors or by persons owning ten per cent of the capital stock in the bank. Special meetings may be called at any time by the board of directors or by the president upon request in writing of stockholders holding ten per cent. of the capital stock. Notices of annual and special meetings shall be given by mailing same to the address of each stockholder at least ten days before such meeting is held. Notices of special meetings shall state the object for which they are called.

57

Each director must be the owner in his own right of at least ten shares of stock.

ARTICLE III.

The board of directors shall meet at least once each month at such time as they may designate, and special meetings may be called at any time by the president, or at the request of any three directors.

Seven directors shall constitute a quorum, but no measure can pass with less than five votes. The board may fill *or* vacan*ices* or remove any officer or employee, and all salaries and compensation shall cease at the time of removal.

ARTICLE IV.

The board of directors shall have the entire management of the property and the business of the bank. The compensation and salaries of employees and officers, the rate of interest to be paid or received, the amount and time of payment of dividends, and all other matters incident to the bank, shall be determined by the board of directors, and all services rendered by any stock holder of the bank shall be deemed gratuitous unless the board has previously agreed to pay for the same.

ARTICLE V.

At the first meeting of the directors after the annual meeting of the stock holders each year, there shall be elected from among
58 their number a president, four vice-presidents, a treasurer, two auditors, and an executive committee, who shall hold their offices for the ensuing year and until their successors are elected and qualified. The board shall also elect or appoint a treasurer, a cashier, and such others as the board may consider necessary for the management of the affairs of the bank.

ARTICLE VI.

The president shall preside at all meetings of stock holders and directors, shall sign all certificates of stock, and with the treasurer, or cashier, execute and acknowledge all instruments under seal which it may be necessary for the bank to execute, except releases and discharges of mortgages, which may be executed by the president alone; and he shall also have authority to sign all checks, drafts, certificates of deposit, or other usual or necessary papers, and in his absence these duties can be performed by the vice-presidents in such order as the board of directors shall indicate.

ARTICLE VII.

The treasurer shall hold all the bonds and securities of the bank and any money not needed for daily use; and he shall see that the proper amount of money is accounted for by the other employés of the bank, and shall perform such duties as belong to the treasurer of a savings bank, and such other duties as shall be assigned to him by the board.

ARTICLE IX.

The treasurer, and in his absence the cashier, shall have the custody of the seal of the corporation; and under the direction of the board shall perform the usual and ordinary duties of their
59 offices subject to the direction of the president; and they shall have authority to sign and counter-sign all checks, drafts, certificates of deposit and other necessary papers. They shall also keep a stock register and with the president execute and acknowledge all instruments under seal which it may be necessary

for the bank to execute under the direction of the board of directors. All checks or drafts or other orders for the payment of money signed by the treasurer or cashier, must be counter-signed by the president, treasurer or cashier, or by one of the vice-presidents who may be designated by the board for that purpose.

ARTICLE XIV.

The one thing to be regarded as of the greatest moment is the safety of loans and investments, in regard to which the following directions shall be rigidly observed:

1. Loans amounting in the aggregate to fifty per cent. of the deposits may be made on first class real estate secured by first mortgages or deeds of trust, where the cash value of the real estate is worth at least double the amount of the loans, and where the time is not greater than five years.

2. Loans may be made on first class collateral security where the collateral is listed or has a certain market value, and can also be converted into money in amount at least twenty per cent. greater than the loan.

3. Loans may be made to the limited estate on three-name paper, where the makers, indorsers or guarantors of the paper are known to the board of directors to be financially responsible for at least twice the amount of the loan over and above their indebtedness or liabilities.

4. Investments may be made in Government, State, county or municipal bonds, or in first class listed bonds or other like securities, and it shall be the policy of the bank to have on hand, in what is known as quick assets, a large percentage of the deposits besides an adequate amount of currency.

5. Loans may be made on real estate on the installment plan for a period not greater than sixty-two months, and the monthly payment on a thousand dollar loan shall not be less than twenty dollars, and made only on unencumbered property worth at least twice the amount of the loan; and in case of such loans the entire expense must be paid by the borrower.

6. Loans may be made on the personal notes of depositors of the bank in any sum not exceeding the amount of their deposits, provided the deposit book of the depositor shall be held by the bank as collateral security for the payment of the loan.

ARTICLE XXI.

These by laws may be amended at any stock holders' meeting, provided notice of such amendment is given at a regular meeting of the board of directors twenty days previous.

These by laws took effect on the 28th day of December 1897.

It was then admitted and agreed between the parties that plaintiffs had no notice of the by-laws or their contents until their production in court and had had no previous knowledge thereof.

61 Whereupon the plaintiffs announced that they rested their case, and the foregoing is all the evidence offered, given or excluded upon the trial of this action, and is all the evidence therein.

Plaintiffs having rested, Mr. Birney of counsel for the defendant, moved the court to instruct the jury to return a verdict for the defendant on the ground that there is no proof whatever to entitle the case to be submitted to the jury either of prior authority to George O. Ferguson to employ counsel for the bank, or of any knowledge by the bank that counsel had been employed, or of ratification by the bank of the employment of counsel.

Whereupon the said motion was fully argued in support of the motion by counsel for the defendant and in opposition to the motion by counsel for the plaintiff, and after hearing such argument the court took the motion under advisement and adjourned until Monday, March 2nd, 1903; and afterward, to wit, on Monday, March 2nd, 1903 at 10 o'clock a. m., the court met pursuant to adjournment and the trial of this action was resumed, and thereupon the court proceeded to render its decision on the motion of the defendant that the court instruct the jury to return a verdict for the defendant.

The opinion and ruling of the court in substance was:

First. That George O. Ferguson, as vice-president of the defendant bank, was without authority, in the absence of the president, to employ plaintiffs as counsel for the defendant bank.

62 *Second.* That the plaintiffs had not, by the foregoing evidence brought home notice of such employment to the defendant bank so as to charge it with responsibility therefor.

Third. That the plaintiffs had not, by the foregoing evidence, proven ratification or acquiescence in their employment by the defendant bank.

To which rulings and holdings of the court, and to each of them separately, plaintiffs then and there at the time prayed an exception, which exception was allowed and was duly noted upon the minutes of the court.

Whereupon the court granted the motion of the defendant and instructed and directed the jury to return a verdict for the defendant, to which action and ruling of the court in sustaining said motion and granting the prayer thereof and directing the jury to return a verdict for the defendant, plaintiffs then and there at the time excepted and prayed an exception, which exception was allowed and was duly noted upon the minutes of the court.

All the proceedings were had and all the exceptions hereinabove mentioned were noted before the jury retired to consider of its verdict, and thereupon the plaintiffs prayed the court, and now pray the court, to sign and seal this their bill of exceptions, to have the same force and effect as if each of the said exceptions were separately

and severally set forth in a separate bill of exceptions, and the
63 same is accordingly done and the court signs and seals this bill of exceptions to have the force and effect aforesaid, now for then, this 4 day of April, 1903.

HARRY M. CLABAUGH, *Justice.*

Settled by consent:
A. A. BIRNEY,
Of Def't's Counsel.
C. A. KEIGWIN,
Att'y for Plaintiffs.

Stipulation as to Transcript.

Filed April 4, 1903.

In the Supreme Court of the District of Columbia.

WILLIAM HEPBURN RUSSELL ET AL., Plaintiffs,
vs.
THE WASHINGTON SAVINGS BANK, a Corporation, Defendant. } Law. No. 42452.

It is hereby stipulated by and between the parties to the above entitled cause through their respective counsel, that the transcript of the said cause on appeal to the Court of Appeals of the District of Columbia shall include the following papers:

1. The declaration with rule to plead, affidavit and bill of particulars.
2. The defendant's plea and affidavit of defense.
64 3. Replication.
4. Memorandum of the verdict.
5. Judgment.
6. Bill of exceptions.

C. A. KEIGWIN,
Attorney for Plaintiffs.
BIRNEY & WOODARD,
Attorneys for Defendant.

65 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 64, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 42,452, at law, wherein William Hepburn Russell *et al.* are plaintiffs and The Washington Savings Bank, a

corporation, is defendant, as the same remains upon the files and of record, in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 7″ day of May, A. D. 1903.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1319. William Hepburn Russell *et al.*, appellants, *vs.* The Washington Savings Bank. Court of Appeals, District of Columbia. Filed May 12, 1903. Robert Willett, clerk.

Court of Appeals, District of Columbia

OCTOBER TERM, 1903.

No. 1319.

WILLIAM HEPBURN RUSSELL AND WILLIAM BEVERLY WINSLOW,
Appellants,

vs.

THE WASHINGTON SAVINGS BANK.

STATEMENT, ASSIGNMENT OF ERRORS AND BRIEF ON BEHALF OF APPELLANTS

W. H. ROBESON
CLAYTON E. EMIG
C. A. KEIGWIN
Attorneys for Appellants.

W. H. ROBESON
WM. HEPBURN RUSSELL
Of Counsel.

The Evening Post Job Printing House

EVENING POST JOB PRINTING HOUSE, NEW YORK.

Court of Appeals,

DISTRICT OF COLUMBIA.

WILLIAM HEPBURN RUSSELL and WILLIAM BEVERLY WINSLOW, Appellants, vs. THE WASHINGTON SAVINGS BANK.	October Term, 1903. No. 1319.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Statement of the case.

This is an appeal from a judgment rendered upon the verdict of a jury in favor of the defendant under binding instructions from the Court below directing the jury to return a verdict for the defendant. The sole questions at issue upon the trial of the case and on this appeal are:

FIRST.—Whether George O. Ferguson, as vice-president of the defendant Bank, had authority, in an emergency, during the absence of the president, to employ plaintiffs as counsel for the defendant Bank in a matter arising in the City of New York,

and in which, in the judgment of the said vice-president, the immediate employment of counsel was necessary.

SECOND.—Whether the plaintiffs, after their employment by the vice-president of the defendant Bank, so notified the Bank of their employment as to charge it with responsibility therefor, even though the original employment by the vice-president was unauthorized.

THIRD.—Whether the plaintiffs, by the evidence adduced in the case, proved ratification of or acquiescence in their employment by the defendant Bank.

FOURTH.—Whether the Court below erred in rejecting the written letter of retainer and evidence of the conversations and transactions between the vice-president of the defendant Ferguson and the plaintiffs regarding the employment of the plaintiffs to act as counsel for the defendant Bank in the matter of the claim of the Bank against the Arkell Publishing Company.

Upon these questions, the opinion and ruling of the Court below, as stated in the bill of exceptions, was:

FIRST.—That George O. Ferguson, as vice-president of defendant Bank, was without authority in the absence of the president to employ plaintiffs as counsel for defendant Bank.

SECOND.—That the plaintiffs had not, by the evidence, brought home notice of such employment to the defendant Bank so as to charge it with responsibility therefor.

THIRD.—That the plaintiffs had not, by the * * * evidence, proven ratification or acquiescence in their employment by the Bank.

FOURTH.—That the plaintiffs were not entitled to make proof of their employment by the vice-president of defendant Bank for and in behalf of the Bank, and were not entitled to give in evidence the written letter of retainer addressed to them and signed by Ferguson as the vice-president of the defendant Bank.

That these are the material questions presented by the record may be readily seen by the following references to the Transcript:

Transcript, p. 35, side p. 62.
Transcript, p. 28, side pp. 49, 50.
Transcript, p. 9, side pp. 14, 15.
Transcript, p. 10, side p. 16.
Transcript, p. 10, side p. 17 and pp. 11, 12.
Transcript, p. 14, side p. 24.
Transcript, p. 15, side p. 26.
Transcript, p. 18, side p. 32.
Transcript, p. 19, side p. 34.
Transcript, p. 20, side pp. 35, 36.
Transcript, p. 21, side pp. 37, 38.
Transcript, p. 22.
Transcript, pp. 23, 24, side pp. 41, 42.
Transcript, pp. 25, 26, side pp. 44, 45.
Transcript, p. 26, side p. 46.
Transcript, p. 29, side p. 51.

It will be noted that in each case where evidence, as above referred to, was offered and rejected, that an exception was duly taken by the plaintiffs who are the appellants.

No question was made as to the rendition of the services or the value of the services, and, on the contrary, it was expressly stipulated that the plaintiffs were not required to take up and prove in detail the several separate items of services and the charges therefor making up the said aggregate of $895.

Transcript, p. 30, bottom of page.

The facts, as shown by the record, briefly stated, are these:

George O. Ferguson, the first vice-president of the defendant Bank, was introduced to the plaintiff Russell in the City of Washington in the summer of 1898. Evidence was offered, but rejected by the Court over the exception of the plaintiff, that this introduction was given by Col. T. H. Anderson, then one of the vice-presidents and directors of the defendant Bank.

Transcript, pp. 8, 9, side p. 14.

The next time that the plaintiff Russell saw vice-president Ferguson was about August 17, 1898, when Ferguson came to the plaintiff's office in New York City and sent in his card, on which he had written "George O. Ferguson, Vice-President, Washington Savings Bank."

Plaintiff Russell was not permitted to testify as to the interview that then took place, but the bill of exceptions shows, in many places, that the offer was made to prove by the witness Russell, as well as by the other plaintiff Winslow, "that Ferguson came to the office of the plaintiff in New York on or about the 16th or 17th day of August, 1898, and represented himself to the plaintiff firm, Russell & Winslow, as the vice-president of the Washington Savings Bank; that he said to Russell that the Bank had discounted two notes of $5,000 each of the Arkell Publishing Company which were secured by the same amount of bonds of the Arkell Publishing Company. The company was on the verge of bankruptcy or insolvency; that he desired the services of Mr. Russell and his firm for the protection of the interests of the Bank, and that there was no indication or intimation on the part of Mr. Ferguson that the consultation was regarding any individual interest of his own or that he was acting otherwise than as the vice-president of the Bank for the protection solely of its interests."

Transcript, p. 21, side p. 37.

This evidence was all excluded and exceptions duly taken by the plaintiffs.

Plaintiff Russell was permitted to testify that the business regarding which Mr. Ferguson conferred with him at the time of his visit to plaintiff's office, August 17, 1898, was a claim of The Washington Savings Bank, the defendant, against the Arkell Publishing Company, which had just failed and had been placed in the hands of a receiver in New York. The amount of this claim was $10,000, and $10,000 of the bonds of the Arkell Publishing Company had been deposited as collateral security for the payment of the debt.

The Arkell Company had failed very unexpectedly and had been placed in the hands of a receiver by proceedings which were practically *ex parte.* The creditors, who were somewhat numerous, were naturally seeking to protect their interests, and it was in this emergency that the matter was brought to the attention of the plaintiffs by Ferguson on August 17. Mr. Ferguson did not have the notes with him. They were notes owned by The Washington Savings Bank, executed by the Arkell Publishing Company.

Transcript, pp. 9, 10, side pp. 15, 16.

Plaintiff Russell also testified that some two or three weeks after the employment through Ferguson on August 17th he was present with Ferguson in the office of The Washington Savings Bank. There were present, during part of the time, Col. Anderson, one of the vice-presidents of the Bank, and Mr. Davidge, its treasurer. That Ferguson was engaged in the private office of the Bank at a desk from time to time and discussing apparently the conduct of the Bank's business. That there was some discussion as to the relative authority of Mr. Ferguson and Mr. Davidge. That Mr. Ferguson became a little excited and said, " Well, I am the vice-president of this Bank, in charge of its affairs here, and I employed Messrs. Russell & Winslow to look

after these matters and I want the course that they advise followed"; that Mr. Davidge said he did not want personally to take any part in the dispute, but before he did anything he wanted to submit the question to Colonel Taylor, the president of the Bank, who was absent. That Ferguson was at the time sitting in the private office of the Bank at a desk which seemed to be one of the official desks of the Bank, and was apparently engaged in conducting the business of the Bank. Colonel Anderson was there part of the time, and rather deprecated taking any part in what seemed at that particular time might be a controversy.

Transcript, p. 9.

Plaintiff Russell further testified that at the consultation with Ferguson on the 17th of August his advice to Ferguson was that "the Bank should advertise and sell the bonds at the earliest moment, and credit the amount realized on the notes; that the Bank would doubtless be able to buy the bonds in at a nominal figure, and would then be able in the insolvency proceedings to prove up the face of the bonds and the balance due on the notes, and receive the distributive share on both the bonds and the notes."

Transcript, p. 21, side pp. 37, 38.

Plaintiff Russell further testified that at different times both Mr. Ferguson, the vice president of defendant Bank, and Mr. Davidge, its treasurer, told the witness that the bonds had been advertised and a copy of the advertisement was shown the witness, and on August 31, 1898, plaintiffs wrote a letter addressed to the Bank in relation to the failure to sell the bonds. This letter, which it was conceded had been received by the Bank, was given in evidence, and to it we direct the attention of the Court.

Transcript, pp. 21, 22, side pp. 38, 39.

It is manifest that on August 31, 1898, plaintiffs wrote this letter with the understanding that they

were counsel of the Bank, and that they were seeking some explanation of the failure of the Bank to make sale of the collateral which it had advertised for sale in accordance with their advice. Incidentally the plaintiffs wrote to the Bank in relation to other properties of the Arkell Company, the debtor of the Bank, saying, "If we do secure an attachment on the properties in Texas, it will certainly further our desires and plans to force Arkell to a settlement *of your entire claim.*"

Transcript, p. 22, side p. 39.

To this letter of the plaintiffs a reply was written by the defendant Bank, signed by its treasurer, the substance of which was that the letter of the plaintiffs would be forwarded to the president of the Bank, Col. Taylor, "for instructions in the premises."

Transcript, pp. 22, 23.

It will be noted that the letterhead of the Bank showed the name of George O. Ferguson as the first named vice-president of the defendant Bank, and in this connection the attention of the Court is directed to the advertisement of the defendant Bank as published in the *Washington Evening Star*, holding out the name of George O. Ferguson as *the* vice-president of the Bank, no other vice-president being named in the advertisement.

Transcript, pp. 22, 23.
Transcript, p. 24, side p. 42.

The evidence in the record that the advice given by the plaintiffs to vice-president Ferguson that the defendant Bank should advertise and sell the collateral held by it to the Arkell notes, was communicated to the Bank and acted upon by it, is clear and conclusive.

Thomas J. Owen, an auctioneer, identified the advertisement in the *Evening Star* of August 29, 1898, advertising for sale certain bonds of the face value

of $10,000, stated that he caused the insertion of the advertisement at the request of Mr. Davidge, who was connected with the Washington Savings Bank.

Transcript, pp. 24, 25, side pp. 42,43.

The advertisement was also given in evidence.

Transcript, p. 25, side p. 43.

Plaintiff Russell testified that he had personally seen the advertisement as inserted in the *Washington Star* at or about the time of its publication in August, 1898, and that after the publication of the advertisement the witness and Mr. Davidge and Mr. Ferguson discussed the question why the bonds had not been sold. Mr. Russell said to Mr. Davidge that he had advised Ferguson, as the vice-president of the Bank, to sell the bonds, and inquired why, after the bonds had been advertised, they were not sold, but Mr. Davidge replied, in substance: "Yes, we advertised the bonds as you directed, but Col. Taylor, when informed of the matter, vetoed the actual sale and we had to stop it."

The evidence is undisputed that at the time of the failure of the Arkell Publishing Company, and at the time of the employment of the plaintiffs by Ferguson, vice president of the defendant Bank, that the president of the Bank, Col. Taylor, was absent from Washington, was not in New York, but was taking his summer vacation in the White Mountains, in attendance upon a sick child.

Transcript, p. 29, side p. 44;
Transcript, pp. 26, 27, side p. 46;
Transcript, p. 10, side p. 17.

The testimony of George O. Ferguson, the vice-president of the defendant Bank, upon his cross-examination in behalf of the defendant, sufficiently shows the facts regarding the employment of the plaintiffs by him in behalf of the defendant Bank, and to this testimony we especially invite the attention of the Court.

Transcript, pp. 18, 19.

It will be seen that this evidence of the witness Ferguson upon his cross-examination, was all admitted without objection, but practically his entire testimony in chief was stricken out upon the objection of the defendant Bank and over the exception of the plaintiffs. For the evidence of the witness Ferguson in chief thus stricken out, we direct the attention of the Court to pages 10 to 16 of the transcript. Upon his cross-examination, the witness Ferguson testified that after the failure of the Arkell Publishing Company, he "hastened to Washington and consulted with Col. Anderson, who is not only the second vice-president of the Bank, but also its counsel; that the witness in this conference referred to the plaintiff Russell and his firm, and that Col. Anderson said he knew Mr. Russell, and most heartly approved of the witness' plan to go immediately to New York and employ them on behalf of the Bank, and that later Col. Anderson expressed entire satisfaction with the witness' action in this particular. Col. Anderson did not express a word of disapproval or state that the witness was without authority to employ the plaintiffs for the Bank; that the witness' position *as first vice-president, acting for the president in his absence*, would have sufficed to a man of Col. Anderson's standing and business sense to render such a proposition ridiculous. That if the witness was without authority to employ the plaintiffs as counsel for the Bank in the absence of the president, and when the witness, *as first vice-president was acting in his stead*, then every act performed by the witness as vice-president during the period of the president's absence, was illegal and unauthorized."

Transcript, pp. 18, 19, side pp. 32, 33.

While most of the examination in chief of the witness George O. Ferguson, as contained in his deposition, was excluded by the Court, the following question and answer were admitted:

"State fully as you can now recollect it, your statement to Messrs. Russell & Winslow, or either

of them, regarding your employment of them to act for the defendant, The Washington Savings Bank, in the matter of said claims, also regarding your position and authority in the Bank."

The answer of the witness Ferguson to this question was as follows:

"I sought the employment of Messrs. Russell & Winslow because Mr. Russell was personally known to Col. Anderson, the second vice-president of the Bank and one of the directors, and who spoke very favorably of him. In conversation with Mr. Russell when I was employing them, I stated, that in the absence of President Col. Taylor I was acting as vice-president, and that after consulting with my associates in Washington, we had decided to place the matter of the collection of the Arkell notes and the entire handling of the matter in their hands."

Transcript, p. 12, top of page, and side p. 20.

It is manifest from this testimoney, which is undisputed, that George O. Ferguson, as the first vice-president of the defendant Bank, was, in the absence of its president, in charge of its affairs and acting in place and stead of the president, and the fundamental question at issue in this case is whether, while so acting, he was, in a case of emergency, authorized to retain counsel for the Bank in the State of New York under conditions, which, in his judgment, called for immediate action for the protection of the interests of the Bank.

Incidental to this question, upon the facts above stated, is what we regard as conclusive evidence of notice to the Bank and ratification by it of the employment of the plaintiffs by Vice-President Ferguson. Ferguson himself testified, in his examination in chief, that he informed Col. Taylor of all that he had done in his absence, and that Col. Taylor approved of his course up to that time and

agreed with him that he would meet him in New York for further consultation with Messrs. Russell & Winslow at a time then definitely fixed and agreed upon.

Transcript, pp. 14, 15, side pp. 25, 26.

So far as the plaintiffs are concerned, it is not questioned that they acted in perfect good faith, believing that they had been employed in behalf of the Bank by Ferguson, its vice-president. The first intimation that they had that other counsel might be in the case was in a letter dated September 6, 1898, addressed to the plaintiffs and signed C. H. Davidge, in which Mr. Davidge, the treasurer of the defendant, informed the plaintiffs that he was directed to refer them to Louis F. Doyle, "our attorney, Times Building, Park Row, for any information you may desire in the matter of the Arkell Publishing Company, referred to in your letter of 31st ultimo."

Transcript, p. 26, side p., 45.

The letter of plaintiffs of the 31st of August, thus referred to, is the one the substance of which has been stated above and which appears in the transcript at page 22.

The plaintiffs seem to have regarded the Davidge letter as merely referring them for information to Mr. Doyle and not as superseding their employment, but it seems that desiring to have the matter of their previous employment definitely stated by vice-president Ferguson, they called upon him to know what their status was, and thereupon he wrote them a letter dated New York City, September 7, 1898, stating that in the absence from Washington and also from New York of Col. Taylor, president of the defendant Bank, he, as vice-president of the Bank, having full authority in the premises, had retained plaintiffs *as attorneys for the Bank* in the matter of its claim against the Arkell Publishing Company. He advised the plaintiffs: "I know nothing of the employment

of any other attorney, and direct you to continue to act for the Bank. It is especially important that you should not decline to do so in view of the conference of the bondholders which you have called to meet at your office to-day pursuant to my request, and in the interest of the Bank I represent."

Transcript, p. 28.

Plaintiffs offered this letter in evidence, but upon the objection of the defendant it was excluded and to its exclusion the plaintiffs excepted, and they assign its exclusion as error in this case.

Simply stated, this whole unfortunate litigation seems to have arisen out of a disagreement between President Taylor and Vice-President Ferguson, which sprung up *after* the employment of the plaintiffs by Vice-President Ferguson as the counsel of the Bank, and which led President Taylor, without consultation with Vice-President Ferguson and without notice to him, to retain other counsel, namely, Louis F. Doyle, Esq., of New York.

There is nothing in the record to show that the plaintiffs were advised of this controversy between the officers of the Bank, or that any such controversy between the officers of the Bank existed on August 17, 1898, at the time of the employment of the plaintiffs in behalf of the defendant Bank by its vice-president. The first definite information that the plaintiffs had upon this subject was in a letter under date of September 14, 1898, written to them by Louis F. Doyle, Esq., in which the authority of Vice-President Ferguson to employ the plaintiffs was denied, and Mr. Doyle advised the plaintiffs that he alone was authorized to represent the Bank. The date of his employment is not shown, but it is evident from the entire transcript that he was employed by President Taylor some time in the early part of September, 1898,

Transcript, p. 30, side p. 58.

Plaintiffs ceased to render any services for the defendant Bank after the receipt of the letter from

Doyle on September 14, 1898, and then made up and presented their bill for services, rendered prior to that time, payment of which bill was refused by the defendant Bank and this suit followed.

On this state of facts, the plaintiffs, as appellants in this court, insist that the Court below erred in directing the jury to render a verdict for the defendant and they make the following specific assignment of errors:

Appellants' assignment of errors.

1. The Court below erred in refusing to submit the case to the jury upon the evidence and in directing the jury to find a verdict for the defendant.

> In support of this assignment, appellants rely upon the evidence in the case as set forth in the Transcript and bill of exceptions, and upon that part of the bill of exceptions showing that "The Court granted the motion of the defendant and instructed and directed the jury to return a verdict for the defendant, to which action and ruling of the Court in sustaining said motion and granting the prayer thereof and directing the jury to bring in a verdict for the defendant, the plaintiffs then and there excepted and prayed an exception, which exception was allowed and duly entered upon the minutes of the Court."
>
> Transcript, p. 35, side p. 62.

2. The Court below erred in holding, as a matter of law, that upon the facts shown by the record and evidence, George O. Ferguson, as vice-president of the defendant Bank, was without authority to employ plaintiffs as counsel for the Bank in the matter of the Bank's claim against the Arkell Publishing Company.

> This assignment of error is supported by the ruling of the Court expressly made "that

there is no proof whatever to entitle the case to be submitted to the jury, either of prior authority to George O. Ferguson to employ counsel for the Bank or of any knowledge whatever by the Bank that counsel had been employed, or of ratification by the Bank of the employment of counsel."

Transcript, p. 35, side p. 61.

3. The Court below erred in holding as a matter of law that there was no evidence sufficient to go to the jury upon the proposition that Vice-President George O. Ferguson of the defendant Bank had authority, either express or implied, to employ the plaintiffs as counsel for defendant Bank.

The ruling to which this assignment relates is clearly shown by the bill of exceptions.

Transcript, p. 35, side pp. 61, 62.

4. The Court below erred in holding, as a matter of law, that there was no evidence sufficient to show ratification by the defendant Bank of the act of its Vice-President George O. Ferguson in employing the plaintiffs, and the Court below erred in not submitting the question of ratification to the jury upon the evidence in the case.

This assignment rests upon the consideration of all the evidence in the case and upon the rulings of the Court as a matter of law as set forth in the bill of exceptions.

Transcript, p. 35, side pp. 61, 62.

5. The Court below erred in holding, as a matter of law, that there was no evidence of notice to, and acquiescence by, the defendant Bank in the matter of the employment of the plaintiffs in behalf of the Bank by its Vice-President, George O. Ferguson; and the Court below erred in refusing to submit, and in not submitting the questions of notice and acquiescence to the jury upon the evidence in the case.

This assignment rests upon a consideration of all the evidence in the case and upon the express ruling of the Court as a matter of law that there was no evidence sufficient to submit to the jury of any knowledge by the Bank that counsel had been employed or of ratification by the Bank of the employment of plaintiffs.

Transcript, p. 35, side pp. 61, 62.

6. The Court below erred in holding and ruling, as a matter of law, and instructing the jury:

"FIRST.—That George O. Ferguson, as vice-president of the defendant Bank, was without authority, in the absence of the president, to employ plaintiffs as counsel for the defendant Bank.

"SECOND.—That the plaintiffs had not, by the foregoing evidence (meaning all the evidence in the case) brought home notice of such employment to the defendant Bank so as to charge it with responsibility therefor.

"THIRD.—That the plaintiffs had not, by the foregoing evidence (meaning all the evidence in the case) proven ratification or acquiescence in their employment by the defendant Bank."

Transcript, p. 35, side pp. 61, 62.

To which rulings and holdings of the Court, and to each of them separately, plaintiffs then and there at the time prayed an exception, which exception was allowed and was duly noted upon the minutes of the Court.

Transcript, p. 35, side p. 62.

7. The Court below erred in divers and sundry instances in rejecting and refusing to admit legal, competent, relevant and material evidence offered by the plaintiffs. The specific errors of the Court

in this respect, each of which is separately assigned and separately relied upon, are as follows:

(*a.*) The Court erred in excluding the letter of George O. Ferguson of September 7, 1898, addressed to the plaintiffs stating the facts concerning their employment in behalf of the defendant Bank, and directing a continuance of their services.

Transcript, p. 28, side p. 49.

(*b.*) The Court erred in sustaining the objection of the defendant to the following question put to the plaintiff Russell:

"State whether or not at that time Mr. Ferguson represented himself to be the agent or an officer of the Washington Savings Bank."

Transcript, p. 9, side p. 14.

(*c.*) The Court erred in excluding the sixth interrogatory and the answer thereto in the examination in chief of the witness George O. Ferguson. Said interrogatory and answer were as follows:

"State whether or not the president of the Bank was, during that month and particularly on the day named (August 17, 1898), engaged in the active management and administration of the affairs of the defendant Bank."

The answer of the witness was "No."

Transcript, p. 10.

(*d.*) The Court erred in excluding the seventh interrogatory in chief to the witness George O. Ferguson and the answer thereto. Said interrogatory and answer were as follows:

"State whether during that month and particularly on the days named, you, as vice-president of the Bank, were giving your personal attention to its affairs and discharging the executive duties in the absence of the president."

The answer of the witness was "Yes."

Transcript, pp. 10, 11, side p. 17.

(*e.*) The Court erred in excluding the 8th interrogatory in chief to the witness Ferguson and the answer thereto. Said interrogatory and answer were as follows:

"If, in answer to interrogatory 7, you state that you were giving attention to the affairs of the defendant Bank during the month of August, 1898, and performing the duties, or some of the duties of the president during his absence upon his summer vacation, then state the circumstances under which you came to so act and what, if any, conversation or conversations you had with President Taylor before his departure for his summer vacation regarding the part you were to take in the administration of the affairs of the Bank during his absence?"

The witness answered: "Col. Taylor, before departing, explained to me the reason for his going, which was largely because of the illness of his little son, and remarked that he might be absent for some time, and requested that I remain at Washington, which I had never done before at this season of the year, and take his place in the Bank as vice-presipent, which I consented to do and did do."

Transcript, p. 11, side p. 18.

(*f.*) The Court erred in excluding the 9th interrogatory in chief to the witness George O. Ferguson and his answer thereto. Said interrogatory and answer were as follows:

"State whether or not you went to the City of New York to the office of the plaintiffs, Messrs. Russell & Winslow, and asked them to act as attorneys for the Washington Savings Bank in the matter of the claims of that bank against the Arkell Publishing Company and the Arkells, father and son."

The answer of the witness was, "I did after consulting with other officers and directors of the bank."

Transcript, p. 11, side pp. 18, 19.

(*g.*) The Court erred in excluding the 11th, 12th, 13th and 14th interrogatories in the examination in chief of the witness George O. Ferguson and his answers thereto.

Transcript, pp. 12, 13.

(*h.*) The Court erred in excluding the 15th interrogatory and the answer thereto in the examination in chief of the witness George O. Ferguson.

Transcript, p. 13, side p. 22.

(*i.*) The Court erred in excluding the 16th interrogatory in chief and the answer thereto of the witness Ferguson.

Transcript, p. 13, side p. 23.

(*k.*) The Court erred in excluding the 17th and 18th interrogatories in chief and the answers thereto of the witness Ferguson, which interrogatories and answers were as follows:

"If in answer to the last interrogatory you state that Mr. Russell did go to Washington with you and did consult with you as vice-president and with the treasurer of the defendant Bank, at the banking house of the defendant in the City of Washington, then state whether or not at that conference any question was raised as to your authority to employ Messrs. Russell & Winslow to act for the Bank or as to their being regularly retained attorneys of the Bank in the matter of its claims against the Arkell Publishing Company."

The answer of the witness to this interrogatory was as follows:

"No question was raised as to my authority to employ Messrs. Russell & Winslow to act for the Bank by any officer thereof or any director during the conference which was had in the Bank at that time nor at any other time. At the conference in the Bank on or about September 10, Messrs. Russell & Winslow were certainly recognized by the Bank

as its counsel, and every phase of the case was gone over with them by myself and the cashier and the second vice-president. At this conference there was no dissent from their counsel expressed by any officer of the Bank."

The 18th interrogatory was as follows:

"State whether at such conference with the treasurer of the Bank the policy to be pursued in connection with the reorganization of the Arkell Publishing Company was discussed, and also the question whether a sale should be made of the collateral held by the Bank to secure the notes of the Arkell Publishing Company representating the claim of the Bank against that Company.'

The answer of the witness was: "Yes, the matter was gone into thoroughly."

Transcript, pp. 13, 14, side pp. 23, 24, 25.

(*l.*) The Court erred in excluding the 21st interrogatory in chief to the witness Ferguson and his answer thereto; said interrogatory and answer being as follows:

"State whether or not it is a fact that you did arrange with President Taylor to hold such consultation with Messrs. Russell & Winslow, stating to him or conveying to him the information that Messrs. Russell & Winslow were acting as attorneys for the Bank in the matter of its claim against the Arkell Publishing Company."

The answer of the witness was: "I informed Col. Taylor of all that I had done in his absence, *and he approved of my course up to that time* and agreed with me that he would meet me in New York for further consultation with Messrs. Russell & Winslow at a time that was then definitely fixed and agreed upon, the date of which I have forgotten."

Transcript, p. 15.

(*m.*) In like manner the Court erred in excluding the testimony of George O. Ferguson in his examination in chief as contained in the following interrogatories and answers thereto:

Interrogatory 22, Transcript, p. 15, side p. 26.

Interrogatory 25; Transcript, p. 16.

Interrogatory 26, Transcript, pp. 16, 17, side pp. 28–30.

Interrogatory 28, Transcript, p. 17, side p. 30.

(*n.*) The Court erred in excluding the following questions put to the plaintiff Russell upon his examination in chief, and erred in excluding the testimony offered to be given in response thereto:

"Q. I will ask you if Mr. Ferguson at this time (August 17, 1898) disclosed that he was in any wise interested in these notes." The question being objected to, the plaintiffs then stated to the Court that they would prove by this witness, in answer to this question, that Ferguson came to the office of the plaintiffs in New York City on or about the 16th or 17th day of August, 1898, and represented himself to the plaintiff firm, Russell & Winslow, as the vice-president of the Washington Savings Bank. He said to Russell that the bank had discounted two notes of $5,000 each of the Arkell Publishing Company, which were secured by the same amount of bonds of the Arkell Publishing Company; that the company was on the verge of bankruptcy or insolvency; that he desired the services of Mr. Russell and his firm for the protection of the interests of the Bank, and that there was no indication or intimation on the part of Mr. Ferguson that the consultation was in regard to any individual interests of his own, or that he was acting otherwise than as vice president of the Bank for the protection solely of its interests."

The Court sustained the objection to the question

and the testimony offered and exception was duly taken.

Transcript, p. 21, side p. 37.

(*o.*) The Court erred in sustaining objections to various questions put to the plaintiff William Beverly Winslow, testifying as a witness in this case, which questions were calculated to elicit testimony showing the acts and conduct of George O. Ferguson, vice-president of the defendant Bank, in connection with the employment of the plaintiffs to represent the Bank.

In view of the foregoing assignments of error upon similar points, we assign generally the errors of the Court in excluding similar testimony of the witness Winslow.

Transcript, pp. 27–31.

In support of the foregoing assignments of error, the appellants submit the following brief:

BRIEF.

I.

The Bank held out Ferguson as its first vice-president and accredited him as such to the public. Therefore, in the absence of the president, he had full power and authority to employ counsel for the Bank in New York in a case which he deemed of urgent importance, requiring immediate legal assistance.

That Ferguson was the *first* vice-president of the Bank is shown by his own testimony and by the advertisements of the Bank.

Ante pp. 9 and 10; Transcript, p. 19, side p. 33; p. 24, side p. 42.

The by-laws of the Bank, while not prescribing in detail all the powers of the president, provide that in the absence of the president "these duties can be performed by the Vice-Presidents in such order as the Board of Directors shall indicate."

Transcript, p. 38; By-Laws, Art. VI.

The record does not show any formal action by the Board of Directors investing Vice-President Ferguson with authority to act in the absence of the president, but it does show that he was in fact so acting; that he was at the banking house of the defendant apparently in chief executive authority, the president being absent for an indefinite period; that he was advertised to the public as vice-president, no other vice-president being named in the advertisement, and that upon the letter-heads of the Bank he was the first named vice-president.

Ante, pp. 5, 6 and 8; Transcript, pp. 10, 12, 14, 15, 18, 19, 22, 23, 24, 25, 26.

That under such circumstances, in a case of seemingly urgent necessity the first vice-president, held out and clothed with authority as such by the acts of the defendant, had power to bind the Bank by the employment of counsel, is, we think clearly established by controlling authority.

Martin *v.* Webb, 110 U. S., 7.
U. S. Bank *v.* Dandridge, 12 Wh., 64.
Fitzgerald Co. *v.* Fitzgerald, 137 U. S.. 98.
Ellison *v.* Branstrator, 153 Ind., 146.

The principal "is bound by the acts of the agent within the apparent authority which the principal knowingly permits the agent to assume, or which he holds the agent out to the public as possessing."

Rohrbough *v.* U. S. Express Co., 50 W. Va., 148; s. c., 88 Am. St. Rep., 849.
Franklin Fire Ins. Co. *v.* Bradford, 201 Pa. St., 32; s. c., 88 Am. St. Rep., 770; see particularly note, 88 Am. St. Rep., pp. 782–785.

Where a party deals with a corporation in good faith and the transaction is not *ultra vires* and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists.

Merchants' Bank *v.* State Bank, 10 Wall., 604, 644.

In the absence of the president of a corporation, it is the duty of the vice-president to act as president, and at such times he is the chief officer of the corporation.

Pond *v.* National Mortgage Co., 6 Kan. App., 718.

Richards *v.* Osceola Bank, 79 Iowa, 707; s. c., 45 N. W. Rep., 294.

Lewis *v.* Albemarle & Raleigh R. R. Co., 95 N. C., 179.

If a corporation which does a large amount of business from the character of which it must be required to bring suits and defend suits brought against it, is in its by-laws and by the inaction of its Board of Directors silent as to the duties of its president, and he is left thereby untrammeled, he has, as one of the powers inherent in the president of such a corporation, authority to take charge of its litigation and to institute and carry on suits for it in its name.

Coleman *v.* West Va. Oil Co., 25 W. Va., 148.

But, it is contended in this case that in the absence of the president the first vice president had no such authority. Indeed, the contention must go to the extent of claiming that the first and second vice-presidents *acting in concert*, had no authority to employ the plaintiffs as counsel, for the record

clearly shows that Mr. Ferguson and Colonel (now Judge) Anderson consulted together and agreed upon the course to be pursued in the matter of the employment of the plaintiffs, and this both *before* and *after* such employment.

Ante, p. 9; Transcript, pp. 10, 11, 12, 14, 18, 19, 21.

It was conceded in the Court below by the learned counsel for defendant, and we assume that it will not be disputed here, that under the circumstances of emergency shown by this record the president of the defendant Bank would have been invested with full authority to employ plaintiffs as counsel. Indeed, such seems to be the settled rule of law.

The power to employ counsel is the one power that the entire current of judicial authorities establishes as unquestionably within the scope of the authority of the president of a bank. "It is a singular fact that the entire collection of judicial authorities justifies the enunciation of only one act as falling within the inherent power of the president. This solitary function is the taking charge of the litigation of the bank. He may appear, answer and defend in suits against the bank. *He may retain and employ counsel on behalf of the bank.*"

1 Morse on Banks and Banking (4th ed.), § 143.

National Bank *v.* Berry, 53 Kan., 696; s. c., 37 Pac. Rep., 131.

"The president of a corporation *virtute officii* has authority to employ an attorney to defend a suit brought against his company."

Beebe *v.* Beebe Co., 64 N. J. L., 498 (1900).

In New York, as in West Virginia, it is expressly held that "the power of the president of a corporation to employ counsel in legal proceedings where the corporation is interested is well established."

Potter *v.* New York Infant Asylum, 44 Hun (N. Y.), 367, 369.

"The vice-president, in the absence of the president, or when the office is vacant, may act in his stead and in such case he has the same powers and duties as the president."

21 Am. & Engl. Ency. of Law, (2d ed.), title, "Officers and Agents of Private Corporations," p. 860, citing the following cases:

Smith *v.* Smith, 62 Ill., 493;

Coleman *v.* W. Virginia Oil Co., 25 W. Va., 148;

Chicago, &c., R. Co. *v.* James, 22 Wis., 194.

The defendant Bank held out its first vice-president, George O. Ferguson, as competent to do what he did.

"It was done in conformity to the established usage of the company in all such cases. Under such circumstances the institution cannot be permitted to deny that he had all such powers as he habitually exercised, and thus assumed to have."

Creswell *v.* Lanahan, 101 U. S., 347, 351.

"Although the agent violates his instructions or exceeds the limit set to his authority he will yet bind his principal to such third persons if his acts are within the scope of the authority which the principal has caused or permitted him to appear to possess."

Mechem on Agency, §§ 278, 279.

"The president was in effect held out to the world, or at least to those banks with which he dealt, as having the powers which he assumed to exercise; and in a controversy between one of such banks with which he had dealings and the defendant bank the latter will not be heard to deny such authority."

U. S. National Bank *v.* First National Bank (C. C. A.), 79 Fed. Rep., 296, 302.

When the scope of the authority conferred by a corporation upon its president does not appear in terms, his authority may be implied from a power he was accustomed to exercise without dissent of the company and with its acquiescence.

Chambers *v.* Lancaster, 160 N.Y., 342.

"Where an officer or agent is the appropriate officer or agent to execute a contract or to do an act of a particular kind in behalf of the corporation, the law *presumes* a precedent authorization regularly and rightfully made, and it is not necessary to produce evidence of such authority from the records of the corporation."

4 Thompson or Corp., § 5029.

Ellison *v.* Branstrator, 153 Ind., 146, 149.

"Those dealing with a bank in good faith have a right to presume integrity on the part of its officers when acting within the *apparent* sphere of their duties, and the bank is bound accordingly."

Merchants' Bank *v.* State Bank, 10 Wall., 604, 650.

The test of the authority of an officer of a corporation is whether he was engaged in the discharge of the general duties of his office and whether the act in question came within such general duties. "The true test of his authority to bind the corporation is not whether he acts in the general office or in a distant state, but whether, at the time he is engaged in the discharge of the general duties of his office, and in the business of the corporation."

Hastings *v.* B. L. Ins. Co., 138 N. Y. 473, 479.

Where a contract made in the name of a corporation by its president is one the corporation has power to authorize its president to make, or ratify after it has been made, the burden is upon the cor-

poration of showing that it was not authorized or ratified.

Patterson *v.* Robinson, 116 N. Y., 193.

"The acting head of the corporation, whether it is the president, vice-president, cashier or general manager, through whom and by whom the general and usual affairs of the corporation are transacted, which custom or necessity has imposed upon the officer—such acts being incident to the burdens reposed in him—may be performed by him without express authority, and in such cases it is immaterial whether such authority exists *by virtue of his office*, or is imposed by the course of business as conducted by the corporation."

Cox *v.* Robinson, 82 Fed Rep. (C. C. A.), 277, 283.
Bank of Batavia *v.* New York, &c., R. Co., 106 N. Y., 195.
Martin *v.* Webb, 110 U. S., 7.

The vice-president or other officer of a corporation who has apparent authority to contract in its behalf binds the corporation by his contracts, and the party with whom he contracts in its behalf, having no knowledge of any limitation upon his authority and finding him apparently in charge of the corporate business, has a right to rely upon the apparent authority of the corporate officer, and can enforce contracts made by such officer in behalf of the corporation.

Johnson *v.* Weed, &c., Mfg. Co., 103 Wis., 291; s. c., 7 N. W. Rep., 236.

"The same rules apply to a vice-president that apply to the president."

2 Cook on Corp. (5th Ed.) § 716, p. 1781.
Ellison *v.* Branstrator, 153 Ind., 146.

A vice-president may employ counsel for a corporation.

Streeten *v.* Robinson, 102 Cal., 542.

Acts done by a president or a vice-president of a corporation within the powers of the corporation, and within the apparent scope of the authority, express or implied, of the president or vice-president, are binding upon the corporation, even though there was in fact a lack of authority, unless it is shown that the person with whom the contract was made by the president or vice-president in behalf of the corporation had actual notice of the lack of authority.

American Exchange National Bank *v.* Oregon Pottery Co., 55 Fed. Rep., 265.

Dexter Savings Bank *v.* Friehd, 90 Fed. Rep., 703, 706.

"In the absence of any showing to the contrary, the president of a corporation will be presumed to have authority to act for it in all matters within the ordinary course of its business."

White *v.* Elgin, 108 Iowa, 522; s. c. 79 N. W. Rep., 283.

Counsel for defendant Bank will doubtless insist in in this Court, as they did in the Court below, that this doctrine is not applicable to the acts of the vice-president, but we submit that in the light of the authorities heretofore cited, the vice-president, in the absence of the president, exercises all the powers of the president, and such is the law both in West Virginia, where defendant Bank has its corporate *situs* and in the State of New York, where the contract of employment with the plaintiff was made.

Coleman *v.* West Va. Oil Co., 25 W. Va., 148.

Not only is this the legal inference in the premises, but Vice-President Ferguson himself testifies that President Taylor, before departing, explained to him the reason for his going, and, to quote his

language, "requested that I remain at Washington, which I had never done before at this season of the year, and take his place in the Bank as vice president, which I consented to do and did do."

Transcript, p. 11, side p. 18.

It is true that this testimony was excluded by the Court below upon the theory that the vice-president could, under no circumstances, have authority to employ counsel, and, therefore, that his testimony as to his authority and its source was inadmissible in evidence. That this ruling is erroneous seems to us manifest as an elementary principle without the citation of authority; but, under another point in this brief, we have collected authorities showing that this evidence ought to have been received.

II.

The defendant Bank is estopped from questioning the authority of Vice-President Ferguson to employ the plaintiffs as counsel for the Bank: (a.) Because it held Ferguson out to the public as its chief executive officer in the absence of its president. (b.) Because it had notice of the employment of plaintiffs by Ferguson in its behalf and acted upon the advice of plaintiffs, after their employment without questioning the vice-president's authority to employ them. (c.) Because with knowledge of the fact that plaintiffs had been employed by Vice-President Ferguson, the Bank permitted them to render the exten-

sive services shown by the record, without in any way questioning the validity of their employment until after such services had been rendered.

Notice to the defendant Bank of the employment of the plaintiffs in its behalf by first Vice-President Ferguson is clearly shown by the following facts, which appear in the record:

The employment was made by the first vice-president while acting as the chief executive officer of the Bank in the absence of the president. Notice to him was, under such circumstances, notice to the Bank. But it may be contended that because Ferguson was an accommodation endorser on the Arkell Publishing Company notes, that therefore, he was interested in the event, and notice to him was not notice to the Bank. The answer to this is twofold: *First*, his interests and the interests of the Bank were identical, so far as the enforcement of the claim against the Arkell Publishing Company was concerned; and, *second*, that second Vice-President Anderson and Treasurer Davidge both had notice of the employment at the time it was made.

Ante pp. 5, 6, 8, 9 and 10; Transcript, pp. 18, 19, side pp. 32, 33.
Transcript, p. 14, side p. 24.

It further appears that Vice-President Ferguson informed President Taylor of all that he had done in his absence, that President Taylor approved of his course up to that time and agreed to meet him in New York *for further* consultation with Messrs. Russell & Winslow at a time that was then definitely fixed and agreed upon, but the date of which the witness had forgotten.

Transcript, p. 15, side p. 26.

All of this testimony is undisputed. Plaintiffs are entitled to the most favorable

inference that can be drawn from it. It necessarily follows that the Bank had notice through the knowledge of its first vice-president, of its second vice-president, of its treasurer, of its cashier and finally of its president. With all of these officers having this knowledge from the very beginning of their employment, plaintiffs were allowed to render services dating from August 17, 1898, to September 10, 1898, as shown by their detailed statement of account (Transcript, pp. 2, 3, 4), and the Bank not only made no objection to the rendition of these services, but actually acted upon the advice of the plaintiffs by advertising the bonds held as collateral to the Arkell Publishing Company note for sale, inserting the advertisement in the *Washington Evening Star*, and fixing the date for the sale of the collateral for August 30th.

Transcript, pp. 24, 25.

Why the sale of the collateral was not made in accordance with this advertisement we have already shown.

Ante pp. 6, 7 and 8.

We submit that on this state of facts the defendant Bank is estopped from questioning the authority of its vice-president to employ the plaintiffs in its behalf.

1 Morse on Banks and Banking (4th Ed.), § 184.

A corporation is charged with knowledge of the extent of the power usually exerted by its managing officer, and must be held to have acquiesced in the possession by him of such authority, even though it has not been expressly delegated to him.

Sun Assn. *v.* Moore, 183 U. S., 642.

Where a party does work for a corporation under a contract with one assuming to act as its agent to the knowledge of its officers, without dissent on its

part, the corporation will be held to have ratified the contract.

Cunningham *v.* Mason, etc., R. Co., 63 Hun (N. Y.), 439, 441.

Notice communicated to, or knowledge acquired by, the officers or agents of corporations when acting in their official capacity or within the scope of their agency becomes notice to or the knowledge of the corporation for all juridical purposes.

4 Thomp. on Corp., § 5191.

The president being absent, notice to the first and second vice-presidents, coming to them in connection with the performance of their official duties, was clearly notice to the Bank.

Bartlett *v.* Woodman Savings Bank, 57 Ill. App., 425.

Smith *v.* Anderson, 57 Hun (N. Y.), 72.

Chipman *v.* McClellan, 159 Mass., 363; s. c., 34 N. E. Rep., 379.

Millward *v.* Cliff Estate, 161 Pa. St., 157; s.c ., 28 Atl. Rep., 1072.

Forbes *v.* Howe, 102 Mass., 427.

Ditty *v.* Dominion National Bk., 75 Fed. Rep., 769.

It was the duty of the corporation to give contrary instructions if they wished to withdraw the management from the vice-president in the absence of the president and to disclaim the action of the vice president promptly after they had notice of such action if they objected to it.

Fitzgerald, &c., Co. *v.* Fitzgerald, 137 U. S., 698.

Corn Exchange Bk. *v.* Am. Dock, &c., Co., 163 N. Y., 332, 339.

The general rule is, that notice of a fact acquired by an agent while transacting the business of his principal operates constructively as notice to his principal. This rule is particularly applicable to

corporate officers while engaged in the employment of official duties.

4 Thomp. on Corp., § 5189.

That which directors ought, by proper diligence, to have known as to the general course of the Bank's business, they may be presumed to have known in any contest between the corporation and those who are justified, by the circumstances, in dealing with it upon the basis of that course of business.

Martin *v.* Webb, 110 U. S., 7.

Even where an officer of a corporation acts avowedly for himself in a transaction with the corporation or in which the corporation is interested, it is sufficient to charge the corporation with notice to show that the officer in question made a disclosure thereof to other and disinterested officers of the corporation whose knowledge may be properly said to be that of the corporation, or at least that he made such disclosure as ought to have put them on inquiry.

4 Thomp. on Corp., § 5206.

It was held that the president who was the general manager and had superintendence of the affairs of the corporation having transferred certain of his shares of stock in the corporation to the plaintiff with the knowledge of the treasurer, such transfer was good although not made upon the books of the company as against the subsequent claim of lien upon the shares by the corporation on account of indebtedness of the president to the corporation. Independently of the consideration that the president and treasurer were *ex officio* members of the Board of Directors, the Court considered the corporation to be chargeable with knowledge of the transaction possessed by the president as its general agent.

4 Thomp. Corp., § 5210.

Bank of U. S. *v.* Davis, 2 Hill, N. Y., 451-461.

North River Bank *v.* Aymar, 3 Hill, N. Y., 262, 275.

It is clear that notice to the Bank will be well communicated if communicated to any agent having authority to act for it in the premises or to any agent whose duty it will be to convey the information to its Board of Directors. It must follow that notice to the corporaton must always be well communicated to that officer who is the official organ of communication between its directors and the outside world, and this officer may be either its president, who is *ex-officio* the chairman of its Board of Directors, or its secretary, who is generally its officer for conducting its correspondence or keeping its records, or in the case of a bank, its cashier for reasons already given with regard to the nature of this office.

4 Thomp. Corp., § 5195.

In this case, notice to Col. Anderson, the second vice-president, and to Davidge, the treasurer of the defendant Bank, must be construed as notice to the Bank, even if Ferguson's authority be doubted, and the advertisement of the collateral for sale in accordance with the advice of plaintiffs, as counsel for the Bank must be taken as showing acquiescence in the employment of plaintiffs as its counsel.

These conclusions are the only fair and reasonable inferences from this evidence. The evidence makes a *prima facie* case for the plaintiffs. The burden is upon the defendant Bank to disprove that *prima facie* case, and the Court erred in ruling otherwise as a matter of law.

In cases where an officer of a corporation is acting partly for the corporation and partly for himself, notice to such officer does not affect the corporation if his personal interest is opposed to that of the corporation, " but it should be carefully noted that this principle applies to notice of facts which it is the personal interest of the president or other officer not so to communicate; for if the nature of the information is such that it would be not only the official duty but *also the personal interest* of the president

or other officer to communicate it, *then there can be no room for the application of the principle and the notice will be held to effect the corporation for rather stronger reasons than otherwise.*"

4 Thomp. on Corp. § 4657.

"Notice to an agent received while he was looking after the interest of his principal in the property in question is notice to his principal, whether he was called upon to act thereon or not."

McClelland *v.* Saul, 113 Iowa, 208;
s. c., 86 Am. St. Rep., 370.

"Notice is imputed to a principal of what his agent did within the *actual* or *apparent* scope of his authority."

Andrews *v.* Robertson, 111 Wis., 334;
s. c., 87 Am. St. Rep., 870.

III.

Upon the evidence shown by the record in this case, the Court below should have submitted to the jury the question of the authority of Vice-President Ferguson to employ the plaintiffs as counsel, and also the question whether the defendant Bank had notice of such employment, acquiesced therein, accepted the services rendered by plaintiffs and acted upon their advice during the period covered by their bill for services as rendered.

"As the Court instructed the jury to find for the defendant on the ground that the plaintiffs had not sustained their action, if the plaintiffs gave or offered to give any evidence which was fit to be con-

sidered by the jury, the judgment must be reversed."

Iasigi *v.* Brown, 17 How., 183, 196.

"It is the duty of the trial Court, when a motion is made to direct a verdict, to take that view of the evidence most favorable to the party against whom it is desired that a verdict should be directed, and from that evidence and the inferences reasonably and justifiably to be drawn therefrom, determined whether or not under the law a verdict might be found for that party."

"In such a case, in order to justify the Court in withdrawing the case from the jury, "the evidence must be so insufficient in fact as to be insufficient in law, amounting to an absence of any material and substantial evidence which, if credited by the jury, would in law justify a verdict in favor of the other party."

Cox *v.* Robinson, 82 Feb. Rep., 277, 282, 283.

In thus stating the rule of law in a case involving the authority of a vice-president to bind a corporation by his acts and conduct, the United States Circuit Court of Appeals in an important case held that "in the light of all the evidence, we are of the opinion that it was within the exclusive province of the jury to determine whether or not Frick had the authority to transfer the Cecil judgment and to represent the bank in the transaction with Robinson, and whether or not the business was transacted on his part for the bank or for himself," and the conclusion of the Court was that "the jury had the right to fairly infer from all the evidence that Frick had the authority, with the knowledge and consent of the directors of the bank in relation to the powers usually exercised by the vice-president and the custom and usage of the bank in its general dealings with its customers in the community, to make the contract with Robinson for the bank."

Cox *v.* Robinson, 82 Fed. Rep. 277, 283.

"Where the evidence is conflicting, and no reasonable or proper inference can be drawn from it as matter of law, the case should be left to the jury."

Baltimore and Potomac R.R. *v.* Mackey, 157 U. S. 72.

It is not the province of the Court to direct a verdict if there is a conflict in evidence or if the evidence is such that different minds might reasonably draw different inferences from the testimony as to proof of a fact material in the case. The Court has no right to usurp the province of the jury by determining the proper inference to be drawn from the evidence and by deciding on which side lies the preponderance of proof.

Bamberger *v.* Schoolfield, 160 U. S., 149.

"It is error to withdraw from the jury the determination of a disputed fact in issue."

Manchester *v.* Ericsson, 105 U. S., 347.

"The Court is not authorized to take from the jury the right of weighing the evidence bearing on controverted facts in issue."

Mutual Life Ins. Co. *v.* Snyder, 93 U. S., 393.

The question of the authority of the vice-president and of notice to, and acquiescence by, the Bank in the employment of the plaintiffs in its behalf, was a question which, upon the evidence, should have been submitted to the jury. In a very similar case the Supreme Court of the United States has said: "The questions whether the requisite authority was not inferable and whether the principle of estoppel *in pais* did not apply, should in this connection also have been left to the jury."

Merchants' Bank *v.* State Bank, 10 Wall., 604, 649.

IV.

The Court below erred in rejecting the testimony of the witness Ferguson and the witnesses Russell and Winslow as to the acts, conduct, statements and representation of Ferguson, vice-president of the defendant, at the time of the employment of the plaintiffs on August 17, 1898, and constituting a part of the res gestæ.

It being proven that Ferguson was the vice-president of the defendant, acting as president in the president's absence; and it being conceded that the president had the power to employ counsel; and the law being that in the absence of the president his duties devolve upon the vice-president, it is manifest that the agency of Ferguson for the Bank is established, and therefore his acts and declarations, while engaged in his official duties and forming a part of the *res gestæ*, are admissible in evidence against the Bank.

"Representations of a president, made in transacting the bank's business, are admissible against it."

1 Morse on Banks and Banking (4th Ed.), § 145.

Anderson *v.* Rome, &c., R. Co., 54 N. Y., 334.

Anvil Mining Co. *v.* Humble, 153 U. S., 540, 554.

So likewise Ferguson was clearly competent as a witness to testify to the nature and extent of his authority, and the repeated exclusion of his testimony in this respect was error.

Mechem on Agency, § 102.

Piercy *v.* Hedrick, 2 W. Va., 458; s. c., 98 Am. Dec., 774.

Gould *v.* Norfolk Lead Co., 9 Cush. (Mass.), 338; s. c., 57 Am. Dec., 50.

"The declarations of the defendant's agent as to matters within the scope of his authority were properly admitted in evidence."

New York, &c., Co. *v.* Fraser, 130 U. S., 611.

"A statement by a general agent of a corporation in the course of his employment as to a fact within his official knowledge, touching the status of a matter entrusted to him, is admissible in evidence on behalf of the party with whom the corporation was dealing at the time."

Agricultural Ins. Co. *v.* Potts, 55 N. J. L., 158; s. c. 39 Am. St. Rep., 637;
Matzenbaugh *v.* People, 194 Ill. 108; s. c. 88 Am. St. Rep., 134.

"Declarations made by the officers of corporations rest upon the same principles as apply to other agents."

Pennsylvania R. R. Co. *v.* Books, 57 Pa. St., 339; s. c. 98 Am. Dec., 229.

It follows that the official position of Ferguson being proven and his relations to the Bank as vice-president acting in the absence of the president being shown, the Court below erred in excluding evidence of his statements to the plaintiffs at the time of their employment and constituting the contract of employment itself.

It is also elementary law that Ferguson was himself a competent witness to testify to his negotiations with the plaintiffs, his parol agreement with them and his statements and representations in connection therewith.

"The fourth allegation of error is, that notwithstanding the acts of Mr. Shough may have apparently been such as to bind the company, he had in fact no authority to bind the company to such acts. It is sufficient to say in respect to this matter that *his own testimony* * * * is that during the date

of these transactions he was acting as its financial manager, and therefore it cannot now repudiate its liability for his actions."

Case Manufacturing Co. *v.* Socksman, 138 U. S., 431, 439.

In the case at bar, the witness Ferguson testified that he was acting as vice president of the defendant Bank as its chief executive officer in the absence of the president, and that as such he employed the plaintiffs as counsel for the Bank. Upon the authority of the foregoing case, it seems clear that his testimony upon this point is conclusive upon the Bank.

We also insist that the exclusion of the letter written by Ferguson as vice president to the plaintiffs on September 7, 1898, was error upon the part of the Court below.

Ante, pp. 11, 12 and 16; Transcript, p. 28, side p. 49.

Without further discussion of the rulings of the Court in excluding testimony, but relying upon the assignments of error heretofore made (*Ante*, pp. 15–21), in this respect, we ask that the judgment rendered below be reversed.

Respectfully submitted,

W. H. ROBESON,
CLAYTON E. EMIG,
C. A. KEIGWIN,
Attorneys for Appellants.

W. H. ROBESON,
WM. HEPBURN RUSSELL,
Of Counsel.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

No. 1319.

RUSSELL AND WINSLOW, APPELLANTS,

vs.

WASHINGTON SAVINGS BANK.

BRIEF FOR APPELLEE.

A. A. BIRNEY,
H. F. WOODARD,
Counsel for Appellee.

THE LAW REPORTER COMPANY, PRINTERS, WASHINGTON, D. C.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

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RUSSELL AND WINSLOW, APPELLANTS,

vs.

WASHINGTON SAVINGS BANK.

BRIEF FOR APPELLEE.

Statement of the Case.

The plaintiffs are lawyers, practicing in the courts of New York; the defendant (appellee) is a corporation, doing business in the District of Columbia. The by-laws of the defendant (Rec. p. 32 et seq.) provide for a board of directors, "a president, four vice-presidents, a treasurer, two auditors, and an executive committee," and that the board shall also elect or appoint a treasurer, a cashier, and such others as the board may consider necessary for the management of the affairs of the bank. The duties of the elected officers are carefully defined. The board of directors "*have the entire management of the property and the business of the bank.*" The president is to preside at meetings, sign certificates and other instruments necessary to be executed, checks, drafts, and certificates of deposit. The only provision as to the four vice-presidents is that, in the absence of the president, his duties, above specified, "*can be performed by the vice-presidents in such order as the board of directors shall indicate* (Art. VI,

Rec. p. 33). There is no distinction in the by-laws between the four vice-presidents.

In August and September, 1898, J. D. Taylor was president of the bank, and George O. Ferguson, J. O. Johnson, T. H. Anderson, and George W. Cissell were vice-presidents (Rec. p. 22).

The bank held two promissory notes for $5,000 each drawn by the Arkell Publishing Co., endorsed by Mr. George O. Ferguson, and discounted at his request by the bank. About $3,800 of the proceeds went to the maker, about $1,000 was paid Mr. Ferguson, and the remainder was applied to his subscription for stock of the bank (Rec. 18). Certain bonds of the publishing company were given as collateral security for the loan. The Arkell Publishing Company failed in August, 1898, and immediately thereafter Mr. Ferguson, the indorser, went to New York, and there, on August 17, sought Messrs. Russell & Winslow, the plaintiffs, and, according to their contention, assumed to employ them on behalf of the bank to take action to save the debt. The plaintiffs (appellants) claim that they, under this employment by Ferguson, performed between August 17 and September 14 legal services for which the bank should pay them; the defendants contend that Ferguson was wholly without authority to employ counsel for the bank, and that the bank not only did not acquiesce in such employment, but repudiated Ferguson's action at the earliest moment, and on September 7 sued Ferguson upon his endorsements on the notes in question, employing other counsel than the plaintiffs for that purpose.

The court held in substance as follows:

1. That Mr. Ferguson, as one of four vice-presidents of the bank, was without authority, in the absence of the president, to employ counsel for the bank.

2. That the bank had not ratified such employment.

For these reasons the court directed a verdict for the defendant (Rec. p. 35).

ARGUMENT.

The rulings excepted to may be divided into three classes, as follows:

a. Those sustaining objections to interrogatories propounded in writing to the witness Ferguson, whose testimony was taken by deposition (Rec. pp. 10 to 17 inclusive).

b. Those refusing to allow the transactions and conversations between Ferguson and the plaintiffs to be given in evidence, without proof of agency in Ferguson (Rec. pp. 8, 9, 10, 21, 23, 24, 26, 27, 28, 29).

c. The instruction to the jury to find for the defendant (Rec. p. 35).

The Ferguson Deposition.

The objections to the interrogatories propounded to Mr. Ferguson were that all were either leading, or called for conversations between the witness and the plaintiffs which were incompetent unless after proof of authority in Ferguson to employ counsel for the bank; or were subject to both objections; or that they called for incompetent conversations with the bank's president.

It is submitted that interrogatories 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 25, 26, 27, and 28 were all grossly leading, and the objections on this ground were all properly sustained. If any error is found in the rulings on the deposition it must be in the allowance of the abbreviated tenth question and of the answer thereto. It is to be noticed that the witness answered fourteen of these questions with a direct affirmative or negative. Since the plaintiffs had ample notice of these objections, which were filed before commission issued, it was not a hardship that they should be sustained.

The Conversations Between Ferguson and Plaintiffs.

If Ferguson was without authority from the defendant bank to employ counsel in its behalf, it is certain that his conversations with plaintiffs, his statements to them that he had authority, and his instructions touching the business were all immaterial, and were properly rejected (1 Morawetz on Corp. 540a). The case then must turn upon the inquiry, Had Mr. Ferguson the authority to employ counsel?

On the trial it was insisted that this authority was found (*a*) in the fact that he was a vice-president, or (*b*) in certain alleged acts of another vice-president and of the treasurer, which, it was claimed, showed acquiescence and confirmation of Ferguson's acts.

As Vice-President He Was Not Authorized.

The by-laws of the bank imposed no duties upon the vice-presidents, and did not distinguish one of them from the others in any way. The board of directors had the "*entire management of the . . . business of the bank*," and to them was reserved the right to designate the vice-president who, in the absence of the president, should preside at meetings and sign papers. The power *to make contracts remained to the board.* Unless, therefore, the title of vice-president *ipso facto* carries with it a right to bind the corporation in contracts, independent of the by-laws, or in defiance of them, Mr. Fergurson could not, nor could any of the other three vice-presidents, without the prior sanction of the board of directors, enter into any contract on its behalf. No authority can be found for the claim that such authority inheres to the office of vice-president. It is common knowledge that these officers are not under salary, and ordinarily perform only the duties of directors. It is startling doctrine that independent of action by the board of directors a vice-president may conclusively determine that he should take up the

business of the bank, and that his contracts should bind it.

> "In absence of special authority a corporate officer can bind the corporation only by his acts done in the discharge of the ordinary duties of his office."

U. S. Bank *vs.* Dunn, 6 Pet. 51.
U. S. *vs.* City Bank of Columbus, 21 How. 356.
New Haven, &c., Co. *vs.* Hayden, 107 Mass. 525.
Mahone *vs.* Manchester, etc., 111 Mass. 72–75.
Hoyt *vs.* Thompson, 1 Selden, 320.
Wash. Gas Lt. Co. *vs.* Lansden, 172 U.S. 534–547.

> "The authority of corporation officers is derived from the board of directors, unless conferred by the charter of the corporation. And before the corporation will be bound by the contracts of such officers it must be shown that authority to so contract has been given by the board of directors, either expressly, impliedly, or by ratification."

Louisville, etc., R. Co. *vs.* McVoy, 98 Ind. 391.
U. S. *vs.* City Bank of Columbus, 21 How. 356.

A nearly analogous case came before the courts of Wisconsin. A vice-president and director assumed to appoint agents to protect the lands and timber of the corporation. It was held that neither as director nor as vice-president had he the right to make such contract; and that when not acting as a member of the board he had—

> "no authority to represent the corporation or bind it by his acts, unless authorized by some proper action of the board, in which case he acts precisely like any other agent of the corporation, and upon the same authority. And so, too, of the vice-president. We consider that his duty, in addition to that imposed upon him as a director, is to preside at meetings of the board in the absence of the president."

Chicago & Northwestern R. R. Co. *vs.* James, 22 Wis. 194.

And where an instruction was that if the plaintiff performed the services sued for, "for the defendant at the instance of its officers and agents," the jury should find for the plaintiff, the judgment was reversed, the Supreme Court saying:

> "Under the rulings of this court the managing and other head officers of a corporation can employ counsel to prosecute or defend suits for the corporation. . . . But this court, and we presume no other court, has ever gone so far as to hold that any officer or agent of a corporation, however humble his station and limited his powers, without any delegation of authority to that effect, could bind the corporation with which he is connected by employing an attorney in behalf of such corporation."
>
> Virginia Lead Mining Co. *vs.* Maupin, 78 Mo. 24.

Had it been shown that the board of directors had designated Mr. Ferguson to act as president and perform the functions of that office, there would be ground for contention that he might employ counsel; even this would be open to doubt.

> Walworth Co. Bank *vs.* Farmers' L. & T. Co., 14 Wis. 358.

As it was, Mr. Ferguson *had no duties*, and consequently no powers. All that was attempted to be drawn from the witness Ferguson by the grossly leading questions 7 and 8, and all that his answers (ruled out) showed, was that Mr. Taylor, the president, "requested that I remain at Washington . . . and take his place in the bank as vice-president, which I consented to do, and did do" (Rec. p. 11). What services he performed, or what business he transacted for the bank, is nowhere indicated. Had the testimony of his conversation with Mr. Taylor been properly asked for, it must still have been held immaterial, for Mr. Taylor could not lawfully usurp the functions of the board of directors and designate an acting president. In recogni-

tion of this the witness in his cross-examination placed his claim of right to employ counsel solely upon the ground that he was vice-president (Rec. p. 20).

As Director Mr. Ferguson Could Not Employ Counsel and Bind the Bank.

"Where a corporation is empowered to act only through its directors, the individual or separate action of the members of such board is not sufficient; for the agent of the corporation is the board of directors acting in its organized capacity, and not its members individually."

Monroe Mercantile Co. *vs.* Arnold, 108 Ga. 449.
Limer *vs.* Traders Co., 44 W. Va. 175.
1 Morawetz on Corp. p. 532.

"The simple fact that a person is acting president of a corporation affords no evidence *per se* of his authority to bind the corporation by contract."

Pixley *vs.* West Pac. R. R. Co., 33 Col. 183.
Farmers' Bank *vs.* McKee, 2 Pa. St. 318.
1 Morawetz on Corp., secs. 251–252.

The Claim that the Employment was Impliedly Authorized or Confirmed.

There was no testimony to support this contention. Ferguson was endorser of the notes, which were purchased at his request, and the bank looked to him for payment. He was the last person who would be employed to care for the interests of the bank. He was not entrusted with the notes at any time (Rec. p. 10) and the bank sued him upon his endorsements as early as September 7, the same day on which he wrote plaintiffs his letter (ruled out) insisting upon his authority to act for the bank, and asserting that such authority was claimed "as vice-president" (Rec. p. 28). That Ferguson knew that the bank intended to hold him is apparent from his letter of August 27, in which he says:

"I am the one now to whom the bank is looking for the money and I am after it with heat and haste" (Rec. p. 20).

Was There Ratification of the Employment?

There can be no ratification unless the principal has full knowledge of the facts (Owings *vs.* Hull, 9 Pet. 607, 629). In this case, unless the bank accepted the employment of plaintiffs, knowing they were employed *in its behalf*, no act of express affirmance was attempted to be shown. It does appear that Colonel Anderson, one of the vice-presidents, approved of the plan of Mr. Ferguson to employ plaintiffs on behalf of the bank, and afterward expressed satisfaction with his action in this behalf (Rec. p. 19), and plaintiffs offered to show that on September 10 (three days after President Taylor had caused suit to be brought against Ferguson on the notes) plaintiff Russell held a conference with Mr. Ferguson at the bank, in which conference the treasurer of the bank and Mr. Anderson, a vice-president and director, participated, and that Mr. Russell asked the treasurer why the bonds, collateral to the notes, had not been sold according to his advice to Mr. Ferguson (Rec. pp. 25, 20), but it also appears that at that conference the treasurer denied the authority of Mr. Ferguson to act in the business, and Mr. Anderson declined to take any part in the dispute (Rec. p. 9).

It elsewhere appears (letter of Ferguson of August 27, Rec. p. 20) that the information given the treasurer was that Ferguson *had employed the plaintiffs on his own behalf*, for his own personal protection from loss. There is, however, no proof that *the board of directors* were ever informed of plaintiffs' employment, or that they, or the president, accepted the plaintiffs as the bank's attorneys. It is immaterial that the treasurer and Mr. Anderson may have been informed; if they could not in terms have authorized the employment they could not by passive acquiescence, or by

acting on advice of the plaintiffs, communicated by Ferguson, ratify such unauthorized employment.

It is to be observed that no proof was made or tendered to show what duties are usually performed by vice-presidents of Washington banks. Neither was any proof tendered that Mr. Ferguson had ever been entrusted with duties of such nature that from his exercise of them the public might assume his authority to employ counsel.

The settled rule is that—

> "one who assumes to deal with a corporation through one of its members must satisfy himself, *at his peril*, that the member has authority to act as agent for the corporation, and that he is acting within the scope of his authority."
>
> 2 Morawetz on Corp., sec. 593.
>
> 1 Beach on Corp., p. 330.
>
> Rice *vs.* Peninsular Club, 52 Mich. 87.
>
> Fifth Ward Savings Bank *vs.* 1st Nat'l. Bk., 48 N. J. Law, 513.
>
> Morris *vs.* Griffith Co., 69 Fed. R. 131.

> "If the agent does not belong to a class whose powers are fixed by custom a different rule prevails, and the party dealing with the agent *must, at his peril, ascertain what powers have been actually delegated to him,* and if these powers are conferred by a by-law of the corporation it is clear that the terms of the by-law must be ascertained."
>
> 2 Morawetz on Corp., sec. 593.

Extraordinary circumstances will not increase his power.

2 Morawetz on Corp., sec. 606.

Washington Gas Light Co. *vs.* Lansden (172 U. S. 534, 547) is a direct authority for the action taken by the court, and we submit that the judgment should be affirmed.

A. A. BIRNEY,
H. F. WOODARD,
Counsel for Appellee.

Court of Appeals, District of Columbia

OCTOBER TERM, 1903

No. 1319

WILLIAM HEPBURN RUSSELL AND WILLIAM BEVERLY WINSLOW
Appellants

vs.

THE WASHINGTON SAVINGS BANK

SUPPLEMENTAL BRIEF IN BEHALF OF APPELLANTS

W. H. ROBESON
WM. HEPBURN RUSSELL
Counsel for Appellants

The Evening Post Job Printing House.

Court of Appeals,

DISTRICT OF COLUMBIA.

WILLIAM HEPBURN RUSSELL and WILLIAM BEVERLY WINSLOW, Appellants, vs. THE WASHINGTON SAVINGS BANK, Appellee.	October Term, 1903. No. 1319.

SUPPLEMENTAL BRIEF IN BEHALF OF APPELLANTS.

I.

Counsel for appellee, the defendant below, lay much stress upon what they term the lack of authority of first Vice-President Ferguson to employ counsel, even under the circumstances of emergency that existed when appellants were employed in New York. We submit that the burden was not upon the appellants, as plaintiffs below, to prove anything more than that the first vice-president of the Savings Bank, in the absence of the president, exercised the authority of the president, acting apparently within the scope of his powers, in the employment of the plaintiffs.

"Where a contract made in the name of a corporation by its president is one the corporation has

power to authorize its president to make or to ratify after it has been made, the burden is upon the corporation of showing that it was not authorized or ratified."

Patterson *v.* Robinson, 116 N. Y., 193.
2 Morawetz on Corp., §§ 593, 594.

The power of the president of a bank to employ counsel is the one power that a bank president is universally conceded to possess.

1 Morse on Banks and Banking (4th Ed.), § 143.

And the powers of a president or of a vice-president, acting in the absence of the president, are by no means limited in the manner and to the extent for which appellee's counsel contend. Morawetz on Corporations gives no countenance to their claim in the case of a president or vice-president, but, on the contrary, expressly says:

"Presidents of corporations by general custom exercise much wider powers than those accorded to them by the authorities cited in the preceding section; and this custom has been judicially recognized. In Smith *v.* Smith, the Supreme Court of Illinois said: 'In the absence of legislative enactment or provisions made in the by-laws, corporations usually act through their president or those representing him, he being the legal head of the body. When an act is performed by him the presumption will be indulged that the act is legally done and is binding upon the body; and as a general rule, *in the absence of the president, or where a vacancy occurs in the office, the vice-president may act in his stead and perform the duties which devolve upon the president.*'"

1 Morawetz on Corp. (2nd Ed.), § 538.

We insist that there is nothing in the record in this case to show that Vice-President Ferguson did not have full authority in the premises, and his own

testimony, which is undisputed, is cogent and convincing upon this point.

This brings us to the contention of counsel for appellee that Vice-President Ferguson was not competent to testify to the nature and extent of his authority, and that, therefore, there was no proof of such authority, from which they think it follows that merely as first vice-president, acting in the absence of the president, he was without power to employ counsel for the bank. We take issue upon both the propositions involved in this statement.

We insist, *first*, that Vice-President Ferguson, in the absence of the president, was the acting executive head of the bank, and as such had power, *as matter of law*, to employ counsel without any proof whatsoever of special authority in the premises.

We insist, *second*, that Vice President Ferguson was a competent witness to testify in his own authority, its source and nature, and that his testimony clearly shows that he was vested with full authority in the matter.

If in either of these propositions we are correct the Court below erred in directing a verdict for the defendant.

II.

Vice-President Ferguson, by virtue of his office as first vice-president, acting in the absence of the president, stood clothed with apparent authority to employ the plaintiffs, and, as between the plaintiffs and defendant, defendant is estopped from questioning the actual existence of the apparent authority.

Merchants' Bank *v.* State Bank, 10 Wall., 604, 644.

Smith *v.* Smith, 62 Ill., 493.

Coleman *v.* West Va. Oil Co., 25 W. Va., 148.

Chicago, etc., R. Co. *v.* James, 22 Wis., 144.
Beebe *v.* Beebe Co., 64 N. J. L., 498.
U. S. Natl. Bank *v.* First Natl. Bank, 79 Fed., 296, 302.

"The rule may be said to be that restrictions upon an agent's apparent authority are not binding upon third persons where there is nothing to put them upon inquiry as to the extent of his actual authority. The question is not what the powers of the agent in fact were, but what power did the company hold him out as possessing? From the business with which the agent was entrusted had the person dealing with him a right to understand that he had the authority to do the particular act in reference to which the principal denies his authority? * * * As between principal and third parties the true limit of the agent's authority to bind the former is the apparent authority with which the agent is invested."

Lake Shore & Mich. South. Ry. *v.* Foster, 104 Ind., 293.
Armour *v.* Michigan Cent. R. R. Co., 65 N. Y., 111, 121–123.

"An agent is competent to testify to the fact of his agency."

Van Sickle *v.* Keith, 88 Ia., 91; s. c., 55 N. W. Rep., 42, 43.

"Though agency cannot be proved by declarations of the agent, yet he is a competent witness to prove it, and his testimony cannot be restricted to the mere words used by the principal, but is admissible generally on the whole subject."

Lawall *v.* Groman, 180 Pa. St., 532, 542; s. c., 37 Atl. Rep., 98.
Wyhart *v.* Pennington, 20 Montana, 158, 162; s. c., 50 Pac. Rep., 413.

"If it is deemed essential to prove the authority by the agent himself, he must be called as witness, his testimony as to the nature and extent of his authority, where it rests in parol, being as com petent as that of any other witness.

Mechem on Agency, § 102.

"At the trial in the Court of Common Pleas, the plaintiffs called Adams as a witness to prove that he was the agent of the corporation and as such authorized to accept the draft in question; to which the defendants objected. The Court, however, overruled the objection, and permitted him to testify as to his agency and authority. This, we think, was according to the rule that an agent acting under parol authority is competent to prove his own agency by his testimony; a rule founded on convenience and necessity and supported by general usage, and it does not come within any of the exceptions to the rule."

Shaw, Chief Justice, in Gould *v.* Norfolk Lead Co., 9 Cush. (Mass.), 338.

In an Iowa case, plaintiffs called the agent of an insurance company, exactly as in the case at bar plaintiffs called Ferguson, the first vice-president of the defendant bank, as a witness, and by him proved, or sought to prove, his agency and authority. Objection was made to this evidence, and, in the language of the Iowa Supreme Court, "defendant moved to strike out this evidence 'on the ground that no agent's authority or agency can be proven by the agent himself'" (citing Moffitt *v.* Cressler, 8 Iowa 122, and other cases).

Upon this objection and the authority cited in support of it, the Supreme Court of Iowa comments as follows: "In Moffitt's case it is said: 'To bind the principal by the representations of a third person, the agency of such third person must be shown otherwise than by his declaration. He may prove his agency by his own oath if the authority is conferred

by parol, or it may be established in many ways, as by the declarations or admissions of the principal, but it cannot be by the declarations alone of the person assuming thus to act.' The other cases recognize the rule that neither the agency nor the extent of his power can be established by the declarations of the supposed agent; but in neither is it held that agency and powers may not be proven by the agent himself. In Van Sickle *v.* Keith (88 Iowa, 14; 55 N. W. Rep., 43), the defendant was permitted to testify that he was the agent for his wife and her mother. It was urged that this evidence was incompetent to prove the fact of agency. The Court says: 'This is a misapprehension of the rule. It is the rule that the declarations of the agent are not competent to establish the fact of his agency, and the authorities cited are to that effect, but the declarations of the agent and his testimony to prove the facts are quite different. We know of no rule against the agency being established by the testimony of the agent.' "

O'Leary *v.* German American Ins. Co., 100 Iowa, 390; s. c., 69 N. W. Rep., 686, 687.

" The evidence of the husband, Owen Roberts, was received, against objection, to show that he had been made the agent of his wife to take care of and manage the property destroyed and to keep it insured. In other words, the husband was allowed to qualify himself as a witness for his wife by testifying directly to the fact of his agency. The appellant claims that this was error, and that the fact of such agency must be proved by other evidence. This is the first question presented. This exact question was presented and decided in the case of O'Connor *v.* Insurance Co., 31 Wis., 160, where it was distinctly held that the authority of an agent, when not in writing or required to be, may be proved by the agent himself, and that this prin-

ciple operates in the case where the wife acts as agent for the husband or the husband for the wife."

Roberts *v.* Northwestern National Ins. Co. (Wis.), 62 N. W. Rep., 1048, 1049.

See also O'Connor *v.* Insurance Co., 31 Wis., 160.

"The rule that agency cannot be proved by the acts and declarations of the agent is modified where the principal is an artificial individual, all of the acts of which must be done through agents."

Abbott's Trial Brief (2nd Ed.), p. 129; citing Missouri R. R. Co. *v.* Simmons, 6 Tex. Civ. App., 621; s. c., 25 S. W. Rep., 996.

III.

Counsel for appellee cite several cases and authorities upon their brief to the proposition that "a member" of a corporation or "a director," in his capacity as director, is without authority, except where it has been expressly conferred, to contract in behalf of the corporation. This, of course, is settled law, which we do not dispute, but it has no application to the facts of this case. Appellants are not seeking to hold the bank for a contract entered into in its behalf by a member or by Ferguson as a mere director. *It was Ferguson, vice-president,* acting head of the bank in the absence of the president, who employed the plaintiffs, and by his act we insist the defendant was bound.

"The officers of the bank are held out to the public as having authority to act according to the general usage, practice and course of their business; and their acts within the scope of such usage, practice and course of business would in general bind

the bank in favor of third persons possessing no other knowledge. * * * It would be not only inconvenient but perilous for the customers or any others persons dealing with the bank to transact their business with the officers upon any other presumption."

Story, *J.*, in Minor *v.* Mechanics' Bank, 1 Pet., 46, 70.

Counsel for appellees close their brief with the statement that "Washington Gas Light Co. *v.* Lansden (172 U. S., 547) is a direct authority for the action taken by the Court" below, and sustains the action of the lower Court in directing a verdict for the defendant upon the undisputed evidence offered in support of plaintiffs' claim.

We respectfully submit that the learned counsel for appellee have wholly misapprehended the scope and tenor of the Washington Gas Light Co. case. In that case, which was an action of tort against a corporation, the plaintiff's claim rested upon certain letters written by the general manager of the corporation. The general manager, being called as a witness, expressly testified that he had no authority to write the letters for the corporation; that he did not write them in his capacity as general manager, but wrote them as a personal matter entirely. His evidence was undisputed, and there was nothing in the letters in conflict with his testimony. Upon this state of facts, the Supreme Court held that a verdict was properly directed for the defendant corporation, but they expressly rule that "if there were other evidence in the case from which a contrary inference could properly be drawn —evidence from which it could be inferred that the manager was acting within the scope of his employment as manager; in such case, it would be proper to refer the question of fact to the jury to ascertain whether the letters were written within the scope of his employment, notwithstanding his assertion

that he wrote them in his personal capacity, *but there is no such evidence.*"

Washington Gas Light Co. *v* Lansden,
172 U. S., 547.

In the case at bar the testimony of Vice-President Ferguson is just the opposite of the testimony given by the general manager in the Washington Gas Light Co. case. Vice-President Ferguson's testimony is that he was acting as the official head of the bank, that he did have authority to so act, and that he did employ the plaintiffs in behalf of the bank. Consequently, we respectfully insist that the language quoted above from the opinion of Mr. Justice Peckham in the Washington Gas Light Co. case is *absolutely conclusive against the contention of the defendant bank*, and that upon the authority of that case alone we are justified in requesting that the judgment in this cause be in all things reversed.

Respectfully submitted,

W. H. ROBESON,
WM. HEPBURN RUSSELL,
Counsel for Appellants.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

No. 1319.

WILLIAM HEPBURN RUSSELL AND WILLIAM BEVERLY WINSLOW

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A. A. BIRNEY,
H. F. WOODARD,
Attorneys for Appellee.

THE LAW REPORTER COMPANY, PRINTERS, WASHINGTON, D. C.

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Counsel now appear to concede that a vice-president may not by reason of the mere fact that he is vice-president enter into contracts which will bind the corporation. They expressly concede that a director may not do so (p. 7).

They suggest, however, that Ferguson was held out to the public as the acting head of the bank, discharging the functions of the president, and clothed with the authority to contract for the bank. They say of Ferguson that he was "vice-president, acting head of the bank in the absence of the president," and upon this assumption base their whole argument that the bank is estopped from denying his authority. There is no proof of anything to justify this contention, and it was for absence of this proof that the court took the case from the jury.

It was not shown (*a*) that Ferguson *had ever performed any act whatever* for the bank; or (*b*) that the bank had held him out to the public as entrusted with any duties or powers, except as a director.

The Evidence.

It was sought by the 6th, 7th, and 8th interrogatories to elicit from the witness Ferguson (Rec. pp. 10–11) that President Taylor was not giving personal attention to the affairs of the bank on August 16, 17, and 18, 1898, and that Mr. Furguson was performing "the duties or some of the duties of the president" (Int. 8), but these questions were all ruled out as offensively leading, and the answers were, of course, not in evidence.

Upon cross-examination the witness after asserting that Vice-President Anderson did not "state that the witness was without authority to employ the plaintiffs for the bank," proceeded *to argue*, "That the witness' position as first vice-president acting for the president in his absence," would have sufficed etc., and further—

> "That if the witness was without authority to employ the plaintiffs as counsel for the bank in the absence of the president, and when the witness as first vice-president was acting in his stead, then every act performed by the witness during the period of the president's absence as vice-president was illegal" (Rec. p. 19).

This argumentative and hypothetical declaration is the only language in any of the testimony from which it may be argued that Ferguson was in fact discharging the duties of the president of the bank. The witness does not point *out any act performed by him for the bank*, and there is no evidence of express authority from the directors or *even from the president*, who appears to have kept in close touch with the treasurer (Rec. pp. 23, 25). We submit that this falls far short of the evidence necessary to prove that Ferguson was

in fact discharging the regular duties of president of the bank.

The Alleged Holding Out.

There is no evidence of "holding out." The only circumstance pointed to by plaintiffs to sustain this theory is that "two or three or four weeks after" the employment of the plaintiffs, Mr. Russell met Mr. Ferguson in the office of the bank, "that Ferguson was engaged in the private office at a desk from time to time, and discussing *apparently* the conduct of the bank's business" (Rec. p. 9).

This was on September 10 (Rec. pp. 13, 14, 23), or *three days after the bank had sued Mr. Ferguson on his indorsement of the Arkell notes* (Rec. p. 31), thus disaffirming in the most emphatic way the assumed authority of Ferguson in that business.

And at that interview of September 10, the treasurer gave clear notice to Mr. Russell that Mr. Ferguson had no authority (Rec. p. 9), or that his claim was disputed.

There is, then, not the least evidence to show either:

(*a*) That Ferguson had any regular duties as vice-president;

(*b*) That he had any special duties;

(*c*) That he ever, in fact, discussed any business of the bank, except this matter, which was also his business;

(*d*) That plaintiffs ever saw him at the bank prior to their employment by him, on August 17, or prior to September 10, so that *they could not have been misled* by any acts of his. There was, therefore, no estoppel.

We decline to be put in the position of insisting that an agent is incompetent to prove his agency. We admit that he may testify to facts which show his agency, but deny that Ferguson's declarations to Mr. Russell that he had authority can be taken to establish such authority. There

never has been contention to the contrary. This was what the trial judge decided when he ruled out Ferguson's conversations with Mr. Russell, as attempted to be related by the latter.

Had there been proof of *the fact of authority or agency*, we would have had no valid objection to the agent's conversations with the plaintiff upon subjects within the scope of such agency.

None of the cases cited as authority for appellants' propositions are contrary to these positions.

A. A. BIRNEY;
H. F. WOODARD,
Attorneys for Appellee.